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IN THE

# Supreme Court of the United States

**October Term 1970**

**No. 1034**

WILLIAM CAHN, District Attorney for Nassau County, State of New York, RICHARD DELIN, Chief Ass't District Attorney for Nassau County, State of New York, JOHN LANG, Detective Sergeant, Nassau County Police Department,

*Petitioners,*

v.

BETHVIEW AMUSEMENT CORP., GEORGE HALL, RUTH BAKEY, CLYDE BRUCE, TOM CUCCAROLE and RICHARD HALBACK,

*Defendants.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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# INDEX


| | PAGE |
|---|---|
| Opinions Below | 2 |
| Jurisdiction | 2 |
| Questions Presented | 2 |
| Constitutional Provisions Involved | 3 |
| United States Constitution | 3 |
| Statement | 4 |
| Reasons for Granting the Writ | 5 |
| 1. The search warrant herein was not constitutionally infirm | 5 |
| 2. Even if the seizure herein were constitutionally objectionable, and it is not, that would not be a valid ground for the granting of federal injunctive relief in these circumstances | 25 |
| 3. There is apparent disparity of decisions within the Second Circuit with respect to whether or not a prior adversary proceeding on the issue of obscenity is required prior to authorized seizure | 44 |
| 4. Review of the issues in this matter are of extreme importance to law enforcement | 46 |
| Conclusion | 46 |
| Appendix A-1 | 1a |
| Appendix B-1 | 5a |
| Appendix C-1 | 10a |
| Appendix D-1 | 29a |

## Cases Cited

PAGE

A Quantity of Copies of Books v. Kansas, 378 U.S. 205 ..... 6, 8, 9, 10, 11, 12, 13, 14, 15, 17, 19, 20, 32, 36

Cambist Films, Inc. v. Illinois, 292 F. Supp. 183 .... 16

Cameron v. Johnson 390 U.S. 611 ..... 25, 35

Chicago Life Insurance Co. v. Cherry, 244 U.S. 25 .. 23

Cleary v. Bolger 371 U.S. 392 ..... 17, 32, 40

Cole v. Arkansas, 338 U.S. 476 ..... 21

Commonwealth v. Jacobs, Supreme Court of Mass., 1963, 191 N.E. 2d 873 ..... 10

Daniman v. Board of Education, 23 Misc. 2d 664 .... 42

Dombrowski v. Pfister, 380 U.S. 479 ..... 25, 27, 28, 29, 30, 34, 41, 42

Douglas v. City of Jeanette, 319 U.S. 157 ..... 17, 28

Fuqua v. United Steelworkers, 253 F. 2d 594 (6th Cir.) ..... 27

Hagan v. Lucas, 35 U.S. (10 Pet) 400 ..... 39

Hoag v. New Jersey, 356 U.S. 464 ..... 21, 22, 23

Hurtado v. California, 110 U.S. 516 ..... 21, 23

Kay v. United States, 303 U.S. 1 ..... 22

Lanzetta v. New Jersey, 306 U.S. 451 ..... 21

Lebowich v. O'Connor, 309 Fed. 2d 111, 2d Cir. ..... 40

Lee Art Theatres, Inc. v. Virginia, 392 U.S. 636 .... 7, 8, 10, 11, 15, 22

Mishkin v. New York, 383 U.S. 502 ..... 8, 9, 10, 11, 15

| Cases (Cont'd): | PAGE |
|---|---|
| Palko v. Connecticut, 302 U.S. 319, 82 L. ed. 288 .... | 23 |
| Péck v. Jeness, 48 U.S. (How.) 612 ..... | 39 |
| People v. Asaro, 57 Misc. 2d 373, 291 N.Y.S. 2d 613 Sup. Ct. 1968 ..... | 18 |
| People ex rel. Corwin v. Walter, 68 N.Y. 403 ..... | 27, 41 |
| People v. Rothenberg, 20 N.Y. 2d 35 ..... | 10 |
| Potwara v. Dillon, 386 F. 2d 74 ..... | 14, 15, 17, 19, 27, 33 |
| Progress Dev. Co. v. Mitchell, 182 F. Supp. 681 N.D. Ill. rev. on other grounds, 281 F. 2d 222 (7th Cir.) | 27 |
| Pugach v. Dollinger, 365 U.S. 458 ..... | 40 |
| re Louisiana News Co., 1960, D.C. La. 187 F. Supp. 241 ..... | 10 |
| Roth v. United States, 354 U.S. 476 ..... | 11 |
| Spielman Motor Sales Co. v. Dodge, 295 U.S. 89 .... | 26 |
| Stanford v. Texas, 379 U.S. 476 ..... | 6, 7, 11, 15, 22 |
| Steffaneli v. Minard, 342 U.S. 117 ..... | 27, 32, 37, 39, 40 |
| Stevens v. Frick, C.A. N.Y. 372 F. 2d 378, cert. den. 387 U.S 920 ..... | 37 |
| United States v. Peisner (C.A. 4, 1962) 311 F. 2d 94 | 10 |
| U.S.A. v. Wild and Corrado — F. 2d — Vol. 162, N.Y. L.J. No. 104, Dec. 1, 1969, pages 1, 4 and 5 ..... | 44 |
| Valentine v. Christenson, 316 U.S. 52 ..... | 43 |
| Whitney v. California, 274 U.S. 357 ..... | 21 |
| Wilkinson v. Tyrone, Inc., 6 Cr. L. 4093 ..... | 46 |
| Zwicker v. Boll, 391 U.S. 353 ..... | 26, 35, 36, 37 |
| Zwickler v. Koota, 389 U.S. 241 ..... | 28, 38, 39, 42 |

## Statutes Cited

PAGE

Constitution of the United States:

First Amendment .....2, 3, 7, 10, 11, 12, 19, 20, 23, 24, 25, 26, 28, 29, 30, 31, 32, 33, 34, 40, 42, 43

Fourth Amendment .....2, 3, 11, 23

Fourteenth Amendment .....2, 4, 19, 20, 21, 23, 29

New York Code of Criminal Procedure
Section 22-a .....18, 19, 21

18 U.S.C. Section 1461 ..... 44

28 U.S.C. Section 1254(1) ..... 2

28 U.S.C. Section 2283 .....27, 29, 35, 38, 39

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WILLIAM CAHN, District Attorney for Nassau County, State of New York, RICHARD DELIN, Chief Ass't District Attorney for Nassau County, State of New York, JOHN LANG, Detective Sergeant, Nassau County Police Department,

*Petitioners,*

v.

BETHVIEW AMUSEMENT CORP., GEORGE HALL, RUTH BAKEY, CLYDE BRUCE, TOM CUCCAROLE and RICHARD HALBACK,

*Respondents.*

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a writ of certiorari be granted to review the decision and judgment of the United States Court of Appeals for the Second Circuit entered and decided on October 6, 1969 in the case entitled in that Court as follows:

"BETHVIEW AMUSEMENT CORP., GEORGE HALL, RUTH BAKEY, CLYDE BRUCE, TOM CUCCAROLE and RICHARD HALBACK,

Plaintiffs,

v.

WILLIAM CAHN, District Attorney for Nassau County, State of New York, RICHARD DELIN, Chief Ass't District Attorney for Nassau County, State of New York, JOHN LANG, Detective Sergeant, Nassau County Police Department,

Defendants."

## Opinions Below

The opinion of the Court immediately below, as yet unreported, is printed in the Appendix hereto as Appendix A-1. Annexed hereto as Appendix B-1 is a copy of the Order of the Honorable Anthony J. Travia, Judge of the United States District Court for the Eastern District of New York, granted and entered on June 6, 1969, which Order was the subject of an appeal which culminated in the decision and judgment of the United States Court of Appeals for the Second Circuit dated October 6, 1969, Appendix A-1, *supra*.

## Jurisdiction

The decision and judgment of the United States Court of Appeals for the Second Circuit, dated October 6, 1969, affirmed an Order of the Honorable Anthony J. Travia, dated June 6, 1969, which Order, *inter-alia*, directed the return of a motion picture film entitled, "ODD TRIANGLE", together with trailers and a lens, to Respondent Bethview Amusement Corp., on the grounds that the seizure of said print of said film, together with trailers and a lens, constituted an illegal seizure in violation of Respondents' rights protected by and under the First, Fourth and Fourteenth Amendments to the United States Constitution. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

## Questions Presented

1. The main question presented is whether an adversary proceeding is required to be held on the issue of obscenity with respect to a print of a motion picture film before the print of the film could be seized by the police pursuant to a search warrant issued by a State Court Judge who had viewed the print of the film, "ODD TRIANGLE", prior to the

simultaneous issuance of a search warrant and arrest warrants in the case.

2. Petitioner also seeks to preserve for argument, should certiorari be granted, the questions whether:

(a) The order and judgments of the courts below in effect operated to enjoin a State prosecution by mandating that the seized motion picture film be returned to respondent-corporation;

(b) The apparent diversity of opinion within the United States Court of Appeals for the Second Circuit, which seems to dictate that certain type of alleged obscene material may be seized without prior adversary proceedings as products of a search incident to a lawful arrest, whereas an alleged obscene motion picture film may not be seized pursuant to a lawfully issued search warrant unless there had been prior adversary hearings.

## Constitutional Provisions Involved

### United States Constitution

AMENDMENT [I.]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT [IV.]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT [XIV.]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## Statement

On May 6, 1969, The Bethview Theatre, located in Bethpage, Nassau County, New York, owned by the Respondent Bethview Amusement Corp., was exhibiting a film called "ODD TRIANGLE".

Judge Charles P. Marchese of the First District Court of Nassau County viewed the film at this theatre and immediately thereafter issued a search warrant and arrest warrants on application of one of the petitioners, John Lang, Detective Sergeant of the Nassau County Police Department, under the direction of the other petitioners herein. The police officers, under the direction of petitioners, seized the print of the film "ODD TRIANGLE", together with other items authorized by the search warrant.

As a result of this action, the Respondents brought an action in the United States District Court for the Eastern District of New York and, in connection therewith, sought a preliminary injunction ordering the return of the film.

Judge Travia, by order, *supra,* directed, *inter-alia,* that the film be returned to respondent-corporation.

After the appeal was argued before the Court of Appeals, Second Circuit, but before it was decided, a Judge of the First District Court of Nassau County, State of

New York directed the State court obscenity jury trial to commence. At the State Court trial, the individual respondents herein were either acquitted or the charges against them dismissed, but the corporate-respondent herein was convicted and fined the sum of $5,000 approximately three (3) days prior to the decision of the United States Court of Appeals for the Second Circuit.

Annexed hereto as Appendix C-1 are the Summons and Complaint, Order to Show Cause, supporting affidavits on behalf of respondents. Also annexed hereto as Appendix D-1 are a Notice of Cross-Motion, Affidavit and Proposed Answer, respectively, made on behalf of petitioners, all in the United States District Court, Eastern District of New York.

For the reasons stated, *infra,* petitioners respectfully submit that the seizure of the print of the film "ODD TRIANGLE" was constitutionally valid; that the courts below erroneously, in effect, enjoined a pending State prosecution, by holding that the seizure was unlawful and directing the return of the film to respondent-corporation; and, that there apparently exists a divergence of opinions within the United States Court of Appeals for the Second Circuit, on the issue of required adversary proceedings in obscenity cases, prior to the seizure of allegedly obscene matter.

## Reasons for Granting the Writ

### 1. The search warrant herein was not constitutionally infirm

The search warrant procedure employed by the petitioners in the state criminal proceeding was constitutionally valid, and it follows that the contention of the respondents that this procedure was constitutionally objectionable for lack of an adversary hearing is ill-founded.

Respondents argued in the courts below, in effect, that ex parte search warrant procedure which includes a personal viewing of the film to be seized by the issuing judge prior to the issuance of the search warrant may not be employed where the item to be seized is expressionary material, even if the seizure does not amount to a mass seizure or a total suppression of all copies of the film in question. Respondents and the court below relied upon *A Quantity of Copies of Books* v. *Kansas* (378 U.S. 205) which interpreted the mandate of the First Amendment as requiring an adversary hearing as a prelude to mass seizure involving a far reaching suppression of freedom to circulate literary materials.

In holding and arguing thusly, the court below and the respondents have, in substance said that a procedure which has been used to obtain evidence in obscenity prosecution and other prosecutions of expression now exceed the bounds of constitutional protection and must now be discontinued.

Indeed, the relevant precedents of the United States Supreme Court indicate the constitutional propriety of the search warrant procedure employed by the petitioners in this case.

Thus, for example, in *Stanford* v. *Texas* (379 U.S. 476), which was decided only one year after the *Kansas* decision, the Court clearly indicated that it did not view its *Kansas* rule as applying to limited seizures of expressionary materials protected by the First Amendment under search warrants issued in ex parte proceedings. In *Stanford,* the Court stated at page 485:

> "What this history indispensibly teaches is that the constitutional requirement that warrants must particularly describe the 'things to be seized' is to be accorded the most scrupulous exactitude when the 'things' are *books,* and the basis for their seizure is the ideas which they contain . . . No less a standard

> can be faithful to First Amendment freedoms. The Constitutional impossibility of leaving the protection of those freedoms to the whim of the officers charged with executing the warrant is dramatically underscored by what the officers saw fit to seize under the warrant in this case." (Citations omitted.)

*This language conveys the undeniable implication that a warrant in proper form could pass constitutional muster even though issued in an ex parte proceeding.*

It is further submitted that the clear wording of the *Kansas* decision restricted itself to the situation where a decree was sought which, in effect, barred all circulation of a work protected by the First Amendment. Thus, a court order which sought to confiscate or enjoin distribution from a central distributing warehouse in the region in which all copies of a particular work were kept was envisioned by *Kansas* as unlawful. But, an order which merely sought to obtain only a single copy of such work for a limited period of time for evidentiary purposes was not so barred.

This Court's decision in 1968 in *Lee Art Theatres, Inc.* v. *Virginia,* (392 U.S. 636) stated, in part, in its per curiam opinion:

> "It is true that a judge may read a copy of a book in court room or chambers but not as easily arrange to see a motion picture there. *However, we need not decide in this case whether the justice of the peace should have viewed the motion picture before issuing the warrant.* The procedure under which the warrant issued solely upon the conclusory assertions of the police officer without any inquiry by the justice of the peace into the factual basis for the officer's conclusions was not a procedure 'designed to focus searchingly on the question of obscenity.' id., at 732 6 L. Ed. 2d at 1136, and therefore fell short of constitutional requirements demanding necessary sensitivity to freedom of expression." (Emphasis added.)

In *Lee,* the Court reversed and remanded so that the court below could make a finding on the question of the legality of the seizure. Obviously, if an adversary hearing had been required in such a context, there would have been no point in remanding the case or *expressly reserving the question as to whether or not the Judge issuing the warrant should have viewed the film first.*

Indeed, if an adversary hearing were necessary, the State Court would definitely have been required to view the film during such hearing and this Court would hardly have raised the possibility that a hearing might not be required. Moreover, this Court made no direction to the lower court to determine on remand whether an adequate adversary hearing had been held or even commented as to whether one was held or whether this topic was germane.

In this connection in *Mishkin* v. *New York,* 383 U.S. 502, (1966), this Court gave evidence only two years after its *Kansas* decision that the *Kansas* rule had no application to the limited seziure for evidentiary purposes. At page 512 of its opinion in *Mishkin,* this Court declared in part:

> "It is also maintained that the seizure in the storeroom was made on the authority of a search warrant; yet neither the affidavit upon which the warrant issued nor the warrant itself is in the record. Finally, while the search and seizure issue *has a First Amendment aspect because of the alleged massive quality of the seizures,* see *A Quantity of Copies of Books* v. *Kansas,* 387 U.S. 205, 206 (opinion of Brennan, J.); *Marcus* v. *Search Warrant,* 367 U.S. 717, the record in this regard is inadequate. *There is neither evidence nor finding as to how many of the total available copies of the books in the various book stores were seized and it is impossible to determine whether the books seized in the basement storeroom were on the threashold of dissemination.* Indeed, this First Amendment aspect apparently was not presented or considered by the state courts, nor was it raised in appellant's jurisdictional statement; it appeared for the first time in his brief on the merits.

> In light of these circumstances, which were not fully apprehended at the time we took the case, we declined to reach the merits of the search and seizure claim;" (Emphasis supplied.)

Again, if an adversary hearing were a necessary prerequisite to the granting of a search warrant in such circumstances, there would have been no point in raising the issue as to whether the seizure was one of "massive quality".

If the Court below was correct in its view, the *Mishkin* Court would have been interested in only one question: "Was an adequate adversary hearing held?" If such a hearing must be held in every obscenity seizure context, whether one item is involved or ten thousand, then it would have made no difference to the *Mishkin* Court "how many of the available copies" were seized. Yet, the Court regarded this question of amount as crucial.

Also, the Court in *Mishkin* complained that it could not deal with the Fourth Amendment issue since the search warrant and supporting affidavit were not in the record. However, if an adversary hearing had not been held here (and it was not) it would make no difference whether the search warrant papers were adequate in content. Since the Court complains of the absence of these papers from the record, it obviously thinks it *does* make a difference whether they are sufficient in form, the inference being that if the papers were sufficient, the Court would have rendered a decision on the issue in favor of the seizing officials even though an adversary hearing had not been held.

Here, again, one is struck by the fact that the *Kansas* case is not even mentioned, let alone declared to be controlling. Obviously, it may never have occurred to the Court that the *Kansas* rule had reference to the situation not involving massive seizures. Therefore, this Court must have intended that the normal search warrant procedure was acceptable in that situation.

The film herein was not "on the threshold of dissemination" within the criterion in the *Mishkin* case. The complaint and motion papers did not allege that the particular film print was to be shown again, either at the Bethview Theatre or elsewhere. Moreover, such dissemination has been made impossible, in any case, by the restriction on its use contained in the U.S. District Court judgment herein.

For cases tending to support petitioner's view, see: *People* v. *Rothenberg,* 20 N.Y. 2d 35, 1967; *Commonwealth* v. *Jacobs,* Supreme Court of Mass., 1963, 191 N.E. 2d 873; *United States* v. *Peisner,* (C.A. 4, 1962), 311 F. 2d 94; *re Louisiana News Co.,* 1960, D.C. La. 187 F. Supp. 241).

*Jacobs* and *Rothenberg* are similar in rationale to *Lee* and affirm the necessity of an adequate affidavit, and warrant thus suggesting the propriety of the ex parte search warrant procedure in obscenity cases. The last two cases indicate that a seizure of allegedly obscene materials was constitutionally acceptable even without the authorization of a search warrant, where the seizing officers apply the proper test of obscenity in effecting the seizure.

Running through this Court's decision in the *Quantity of Books* case, like an obscure, but compelling obligato, is the persistent suggestion of the Court's sensitivity to the profound tension between liberty and authority inherent in the setting of that case. Its response to the stimulus of felt danger was an intuition of public policy which prompted it to engraft upon the First Amendment the implementary strategy pronounced in the doctrine in the *Quantity of Books* case—the so-called *Kansas* rule.

This Court was apparently moved by an apprehension of the over-riding threat to the free circulation of ideas posed by the total effectiveness of the mass seizure device of suppression. The Court experienced no similar intima-

tion of a far-reaching confrontation between freedom and the regulatory power in the usual search warrant context not involving mass seizure, as may be gathered from its holdings in the *Stanford, Lee Art Theatres* and *Mishkin* cases.

On a textual analysis, it may be seen that neither the First Amendment nor the Fourth Amendment to the United States Constitution expressly requires an adversary hearing as a precondition to the suppression of obscenity.

On a purely logical analysis, the First Amendment would not appear to be offended when obscenity is suppressed whatever the method employed, since obscenity is not protected expression (see: *Roth* v. *United States*, 354 U.S. 476).

Moreover, if the First Amendment is not violated, then the due process standard is not violated, since the ex parte search warrant procedure has always been held consistent with the requirements of due process in cases not involving First Amendment rights.

Thus, when this Court postulated the requirement of an adversary hearing prior to seizure in the mass seizure—total suppression case of *Quantity of Books* v. *Kansas*, it was, it is submitted, really incorporating in the First Amendment an implementing rule of policy on the obvious assumption that an over-all principle throughout the country permitting this type of mass seizure was just too dangerous to our First Amendment liberties since, if elevated to the level of a national policy, it could, as a practical matter, really substantially limit the freedom guaranteed in the First Amendment.

Mass seizure under the authority of the search warrant issued ex parte does present certain grave factual issues concerning freedom of expression because films and books, before distribution in given regions of the country, are

usually kept in central warehouses or depositories maintained by regional or national distributors.

If the entire contents of these depositories may be seized before they are distributed without the careful consideration of their content, which would be most likely to be achieved in an adversary hearing of the type mandated in the *Kansas* case (at least in theory), then the exercise of First Amendment rights might really be impaired and the goal of a vigorous national thought life might be compromised out of deference to regional parochialism.

However, the same danger is not presented when the ex parte search warrant procedure is used to seize a single copy of such films or books at individual outlets, such as book shops or theatres, after the aggregate of items in the central depositories are widely distributed.

It is not possible to read the *Kansas* case as indicating that the policy the Supreme Court sought to implement was designed to apply to anything other than the type of mass seizure amounting to total suppression there involved. The *Kansas* case gave absolutely no indication that it was necessary for the courts of this country to engraft another rule of policy on the First Amendment, prohibiting the seizure of a *single* item of a work expression (*e.g.* a single book, or a single copy of a film) for evidentiary purposes without full adversary trial of the issue of obscenity including the often protracted testimony of experts as to social values, etc.—which might take days or weeks. The policy of allowing seizure pursuant to a search warrant issued ex parte in such limited circumstances obviously would not substantially endanger our First Amendment liberties.

It is submitted that such a far-reaching policy, in effect, outlawing the ex parte search warrant procedure in all obscenity cases, should not be established without the clear

and explicit mandate of the United States Supreme Court that it is necessary, since such a rule would impose enormous burdens on an already dangerously overtaxed state judiciary. Indeed, such an approach would require two full-fledged obscenity trials—one to procure a search warrant and another to convict the defendant.

That the *Kansas* decision does not enjoin upon the lower courts of this nation such a restrictive and onerous regime of practice may be seen from a reading of a *Quantity of Copies of Books* v. *Kansas*, (378 U.S. 205). In that case, the ex parte court order directed the seizure of some 1,715 copies of novels which amounted to *all* the copies extent in that region of the titles recited in the court order.

That this total suppression factor forms the underpinning of the Supreme Court's decision may be gathered from the following quotations:

> "*All* copies of such titles, however, *1,715* books in all, were seized and impounded, * * *
>
> "It is our view that since the warrant here *authorized the sheriff to seize all copies of the specified titles*, and since P-K was not afforded a hearing on the question of the obscenity even of the seven novels before the warrant issued, the procedure was likewise constitutionally deficient, * * *
>
> "A seizure of *all* copies of the named titles is indeed more repressive than an injunction preventing further sale of the books, * * * *all* copies on which the [sheriff] could lay [his] hands were physically removed . . . from the premises of the wholesale distributor. An opportunity . . . to circulate the [books] and then raise the claim of nonobscenity by way of defense to a prosecution for doing so was never afforded these appellants because the copies they possessed were taken away. Their ability to circulate their publications was left to the chance of securing other copies, themselves subject to *mass* seizure under other such warrants. The public's

> opportunity to obtain the publications was thus determined by the distributor's readiness and ability to outwit the police by obtaining and selling other copies before they in turn could be seized." (Emphasis supplied.)

Respondents relied on the case of *Potwora* v. *Dillon* (386 F. 2d 74 - 2d Cir.). However, in *Potwora*, again there was involved a mass seizure of approximately 7,000 books amounting, in effect, to a total suppression. Moreover, the plaintiffs in *Potwora* did not contest the propriety of the procedure for obtaining limited numbers of the books in question for evidentiary purposes under the search warrant procedure as may be gathered from the court's statement on pp. 75-76, of its opinion as follows:

> "Plaintiffs' counsel protested to no avail against the seizure of copies *beyond the small number that would be needed for a prosecution* * * * the only immediate relief sought was the return of the publications seized *except five copies of each* * * *."

"Judge Henderson, in the exercise of discretion, denied plaintiffs' application for an order directing *return of such of the books as were not needed for the criminal trial* * * *. At the Argument before us the district attorney for Erie County made no effort to defend the legality of the large scale seizure without an adversary hearing * * *." (Emphasis supplied.)

In note 5, on page 76, the court also declared:

> "All here concerned concede that the mass seizures were unconstitutional." (Emphasis supplied.)

Thus, even if *Potwora* had not indicated the propriety of the ex parte procedure with respect to limited seizures, which it did, it could still not have established an invariable rule mandating an adversary hearing in every situation, since the legality of the *Potwora* seizure was not in issue, However, in *Potwora* only the mass of items beyond those needed for trial purposes were ordered returned, a logical

enough result in view of the fact that the District Attorney, in fact, conceded that he had no right to hold this excess.

Here, again, is recognition of the fact that a search warrant issued ex parte can be used for the purpose of obtaining a limited number of copies of a work of expression for evidentiary purposes but not as a substitute for the normal civil trial procedure used to obtain a judgment declaring all of the materials in question within the state obscene, and ordering mass seizure and total state-wide suppression.

Moreover, *Potwora* clearly indicates that even the *Kansas* decision does not authorize a federal court injunction with respect to a pending, ongoing state criminal proceeding, even assuming that *Kansas* can be read as implying something which it nowhere states, namely that such an injunction may issue with respect to a prosecution that is only threatened and not pending.

In this connection, this Court declared in *Potwora,* at page 77:

> "While the Marcus and Quantity of Books decisions demonstrate the invalidity of the seizure, these cases came to the Supreme Court from state courts and did not, and, in the nature of things, could not deal with the propriety of federal injunctive relief."

Thus, the decisions in *A Quantity of Books* v. *Kansas* is not authority for the claim that this Court should affirm the order directing the return of the film herein.

While there is a federal case to contrary effect, *Cambist Films, Inc.* v. *Illinois,* 292 F. Supp. 183, this is merely a District Court decision from Illinois, not New York, and, with all respect, it is based upon a misreading of the decision in the *Kansas* case and an apparent unawareness of the doctrinal thrust of the *Stanford* v. *Texas, Lee Art Theatres, Inc.* v. *Virginia* and *Mishkin* v. *New York,* decisions dis-

cussed, *supra*. A similar analysis may be invoked with respect to the dictim in *Cambist Films, Inc.* v. *Trimbell* (293 F. Supp. 407), and the decision of the 7th Circuit in *Metzger* v. *Pearcy* (393 F. 2d 202).

Also, *Trimbell* went off on a traditional Fourth Amendment analysis in holding that the affidavit supporting the search warrant, being conclusory, rather than factual, in its allegations, was insufficient in statement. Since *the judge had not viewed the film, unlike the instant case,* and since the affidavit was a nullity, it was obvious, under classic Fourth Amendment theory, that probable cause had nowhere been demonstrated. However, there is no better way, to prove probable cause than the way in which it was done in this Bethview Theatre case—by having the judge view the very public exhibition of the film alleged to be violative of the obscenity law.

Furthermore, in *Metzger*, the authorities seized *without the permission of a warrant.* In addition, the Court seemed to recognize the principle that a prosecutor might obtain a single print of a film for evidentiary and trial purposes by seizure without adversary hearing since it declares that the prosecutor might have the use of one print for this purpose, on demand, although he must return the other copies unconditionally.

Even though no adversary hearing was held and no judicial officer authorized the seizure, this right of use was upheld. It may be implied from this that where the ex parte search warrant procedure is used to seize a *single* item of evidence it is not legally nugatory, and is not ineffective to authorize official activity.

Also, despite the fact that only four copies were seized in the *Metzger* case, it appears that such seizure amounted to a total suppression since the four prints were the only ones in the possession of the distributor for that region. Moreover, the movie in question had already been declared

not obscene by licensing boards and courts throughout the country, a factor not present in the instant case. In any event, if the decision of the 7th Circuit be read as supporting the Court below, it is respectfully submitted that such is based upon a misreading of the *Kansas* case.

If the full procedural implications of the lower court judgment herein are followed by the federal bench in future cases, the effect may be to convert the federal court into a forum for conducting state evidentiary suppression hearings, thus displacing the state courts from their traditional functional role. Such a development would be totally inconsistent with the principles of comity and non-interference as between federal and state judicial establishment mandated by a long line of United States Supreme Court cases (*e.g. Stefanelli* v. *Minard*, 342 U.S. 117; *Cleary* v. *Bolger*, 371 U.S. 392) including those pertaining to First Amendment freedoms (*e.g. Douglas* v. *City of Jeanette*, 319 U.S. 157) and would work a radical transformation in the federalistic design of divided sovereignty ordained by the explicit provisions and the internal logic of our constitutional instrument.

In *Potwora, supra*, the Court granted relief ordering the return of the 7,000 books which the plaintiff sought for the purposes of distribution (as distinguished from this case where no further exhibition of the film is intended) because it felt that the state procedure providing for a suppression motion was a remedy of uncertain effectiveness and might not be a servicable means of obtaining return of the *massive* quantities of books there involved. The implication there was that the police did not want to surrender such an enormous amount of obscenity for circulation since, after surrender, it could never reach these copies again and their sheer quantity represented a tremendous threat to public welfare. There is no declaration in *Potwora*, that the state suppression motion is not an effective means of obtaining return of one copy. Indeed, on such a motion

under Section 813-c of the New York Code of Criminal Procedure, the state court has jurisdiction to order return of the seized item (*e.g.* See *People* v. *Asaro,* 57 Misc. 2d 373, 291 N.Y.S. 2d 613 Sup. Ct., 1968).

But New York cases cited by the Court on this point in places other than Nassau County, N. Y., the site of the Bethview prosecution apparently involves situations in which a Police Property Clerk refused to surrender material to the complainant, or where, despite an illegal seizure, the authorities refused to hand over the material in question because they wanted the additional time which would give them an opportunity to bring a suit under § 22-a of the New York Code of Criminal Procedure to obtain an order directing the destruction of the books as obscene. The § 22-a procedure does not include films within the ambit of its remedy.

However, the *Potwora* rationale in this regard does not apply in this case because: (a) By its terms it applies to mass seizure and not limited evidentiary seizures with no dangerous implications for the general circulation of ideas; (b) *since only one copy,* and not 7,000 copies, is *involved here, there is not the urgent need to replace the state remedy with a federal one which would justify the drastic relief of a federal injunction interfering with a state criminal proceeding,* even assuming, without conceding, that the state remedy might be a little slower. Moreover, we are dealing here with an individual outlet rather than a central depository from which a mass of copies have not yet been distributed; (c) the single print of the film herein involved is held by the District Attorney's office, not a Police Property Clerk; (d) the civil remedy under § 22-a of the New York Code of Criminal Procedure is not available in these circumstances since it only authorizes suits with respect to printed materials and photographs. Moreover, even if the language of § 22-a be interpreted differ-

ently, § 22-a of the New York Code of Criminal Procedure, though providing for adversary procedure, is nonetheless expeditious, consuming days rather than weeks, and thus, even if official possession were extended in this degree, it would not constitute an intolerable postponement of the exercise of First Amendment rights, especially where only a *single* print of a film is involved, and, where, as here, there is *no* allegation in the complaint or motion papers that the film is not obscene under the terms of the statute, or that the statute is unconstitutional and there is no claim whatsoever that the respondents herein intend to show the film ever again.

In *Potwora*, the plaintiff, a distributor, clearly intended to distribute the 7,000 books when he recovered them. Respondent corporation in this case is not a distributor of a large quantity of copies who has been prevented from distributing them to numerous individual outlets. It is simply one of the outlets from whom was seized a *single* copy.

If respondent's position is correct then the State can never obtain a search warrant to seize any item that has expressionary content protected by First Amendment rights, without first having an adversary trial. Thus, a copy of a circular stored in an office along with one hundred others preparatory to their circulation to the public could not be seized by ex parte procedure even if it contained evidentiary material tending to prove the commission of some crime or the existence of a conspiracy within the power of government to punish.

For respondents, the Court below to maintain that the blanket rule for which they contend does not apply to such situations, would involve the strange assumption that their protective principle applies to sexual material which may be obscene and thus not protected under the First Amendment but not to non-sexual expressionary material which is protected under the First Amendment. Nor can they hold the rule applies only to films, since they rely chiefly on the *Kansas* case which relates to books.

**Respondents invoked the due process clause of the Fourteenth Amendment but their reliance on the due process conception seems misplaced since the procedure employed by petitioners did not fall below the minimum standard of due process.**

It is not clear whether respondents' recourse to the Fourteenth Amendment is simply an attempt to enforce the First Amendment and its judicially-created derivative, the *Quantity of Books* v. *Kansas rule*, through the Fourteenth Amendment's due process clause in this case or whether plaintiffs are going beyond this "incorporation" or "selective absorption" theory so as to put forward a "pure due process" rationale to the effect that the command of due process varies from one context to another and that the ex parte search warrant procedure does not satisfy the imperatives of the Fourteenth Amendment where expressionary material is involved, even though such a warrant is consistent with due process when used to seize non-expressionary material. Under this approach, it might be argued that the due process clause in effect adds a procedural dimension to the First Amendment so as to implement its core values effectively.

In view of the foregoing arguments, however, it cannot be said that the ex parte search warrant procedure is objectionable on due process grounds. Petitioners contend that this procedure has been employed for too long in too many jurisdictions in obscenity cases to be susceptible of rejection on this ground.

The decisions of the United States Supreme Court establish the proposition that the due process standard of the Fourteenth Amendment is not infringed unless the procedure complained of falls so far below accepted public beliefs as to shock the conscience of mankind. (See ensuing discussion.)

It can hardly be claimed that the use of the ex parte search warrant procedure to seize a single item in an obscenity case is shocking to these accepted standards because the ex parte procedure, as we have seen, has been the accepted means for obtaining seizure of allegedly obscene material throughout this state and country since time immemorial. How can it possibly be claimed that an ex parte search warrant procedure mandated in unqualified language by the People's representatives in statutory enactments such as that contained in New York's Code of Criminal Procedure and acquiesced in by the public for generations as a legitimate device in obscenity cases is offensive to accepted public standards?

Can it seriously be urged that the difference in the respective alternative strategies of search warrant procedure championed by plaintiffs and defendants herein are of such import that the principle of fundamental fairness is implicated or that the awesome powers of federal injunctive relief may be invoked in vindication of one of them. The fact is that whichever form of procedure is selected in the circumstances of this case is a matter of constitutional indifference. The ex parte procedure which was used may be pronounced fundamentally unjust only on the assumption that constitutional review entails judgments of procedural wisdom.

The due process clause of the Fourteenth Amendment was not designed to enforce upon the states federal intuitions of procedural policy or to fasten upon its processes of criminal justice procedural minutiae which are justifiable in terms of administrative preference, rather than constitutional command (see *Hoag* v. *New Jersey*, 356 U.S. 464; *Hurtado* v. *California*, 110 U.S. 516). The Supreme Court has declared on more than one occasion that the States are free to regulate their own criminal procedure. (See *Cole* v. *Arkansas*, 338 U.S. 476; *Lanzetta* v. *New Jersey*, 306 U.S. 451; *Whitney* v. *California*, 274 U.S. 357;

*Kay* v. *United States*, 303 U.S. 1; *Hoag* v. *New Jersey*, *supra*; *Hurtado* v. *California*, *supra*.)

Petitioners could reasonably argue that the difference between the search warrant procedure used and the sort of procedure which would presumably satisfy the respondent's instinct for puristic nuances would not be sufficient to be characterized as one of constitutional dimension in these circumstances *where only one print of a film was involved*, even if this Court had not clearly expressed itself in cases like *Mishkin* and *Lee Art Theatres*.

On any showing, it can scarcely be argued with reason that in these circumstaces the difference in effect between the procedure employed and that previously contended for by respondents is so substantial as to require the corrective intervention of the federal judicial system. To argue this is to found constitutional rights upon discriminations too subtle for the governance of a system of constitutional redress which takes the brute textures of social fact as the underpinning of decision and the realm of gross events as the theatre of its operation. Fundamental law is the ordering instrument of a mundane society, not the vindicator of exquisite niceties. The federal judicial establishment does not exist to decide questions of gossamer substance.

It does not sit to impose upon state legislatures and courts procedural requirements more onerous than are necessary or to decree niceties of adjective organization which are not needed for the protection of substantial interests.

It may be gathered from this Court's pronouncements that a constitutional court will not impose its contravening authority unless the challenged local procedure falls below the minimum standard of civilized practice (see *McNabb* v. *United States*, 318 U.S. 332, 340) on pain of being judged to have invaded those residual powers of State government preserved inviolate against the intrusion of national author-

ity by the very constitutional scheme which sustains the legitimacy of that authority.

The due process clause, enacting a minimum standard, reaches only that official conduct which shocks the civilized sense of justice (*Palko* v. *Connecticut*, 302 U.S. 319, 82 L. ed. 288).

It is not the guarantor of procedural perfection, nor does it enthrone luxurious refinements as the determinants of constitutional propriety (*e.g.* see *Chicago Life Insurance Co.* v. *Cherry*, 244 U.S. 25, 30).

A sophisticated awareness of the appropriate limits of federal judicial authority suggests that it should enjoin upon itself that ordinance of self-denial which accords an apt deference to the prerogatives of the state judiciary and the residual power of the People (recognized in the Ninth and Tenth Amendments and attested by the overall design of an organic instrument which limits the sphere of national power by the tactic of specific enumeration) to fashion for themselves those procedural forms in harmony with the genius of the common life.

This Court has often held that the due process clause of the Fourteenth Amendment does not remove from the ambit of state authority the discretionary competence to contrive its own systems of procedure provided the forms it ordains do not so outrage accepted civilized standards as to offend the minimum standard of fundamnetal fairness (see *Hoag* v. *New Jersey*, 356 U.S. 464; *Hurtado* v. *California*, 110 U.S. 516).

Nor does it seem justified to argue that the due process clause has, in effect, placed an implementing procedural gloss upon the First or Fourth Amendment so as to require an adversary hearing as a pre-condition to the granting of a search warrant in cases such as this. Neither the history or draftsmanship of either Amendment supports such an argument.

Nothing in the First Amendment's phraseology declares the invalidity of the ex parte search warrant procedure or suggests that the Fourth Amendment's warrant clause, which specifically approves such a procedure, is subject to fancied restrictions not embodied in its wording (provided the warrant is really used for evidentiary purposes, as the Fourth Amendment contemplates, and not bent to objectives foreign to its intent such as the seizure of amounts of materials in excess of those needed as evidence in order to effect the same type of total regional or statewide suppression which has traditionally been accomplished by a civil forfeiture proceeding).

Nothing in the language of the First Amendment declares the invalidity of the ex parte search warrant procedure in the seizure of single items of expression, and this mode of seizure has long been sanctioned by public opinion in the State of New York.

Thus, the popular will should be permitted to strike that balance of interests congenial to public judgment in the absence of a Supreme Court decision clearly to the contrary, since not even a marginal threat to free expression is posed when only *one* print of a film is seized for a comparitavely short period while presumably other prints circulated. Also the short delay in the circulation of this one copy of a print already judged obscene by a viewing Judge does not constitute a permanent suppression of important ideas. Seizure for such a limited period, where there is sufficient indication of the film's obscenity that a Judge has found it so, is not so unreasonable a procedural policy that the popular balance of interests sustaining it must be set aside by judicial fiat.

This conclusion is all the more reasonable in these circumstances since, as we have seen, the complaint and motion papers make no allegation that it is intended to show the film again, or circulate it again anywhere, and since the judgment herein, in any event, prohibits such a

showing or circulation prior to the entering of judgment in the State Criminal Prosecution.

In light of the foregoing, it is plain that the ex parte search warrant procedure employed by petitioners was not constitutionally objectionable. Since the judgment herein is based on the contrary view, it is obvious that it is legally unfounded and subject to reversal.

**2. Even if the seizure herein were constitutionally objectionable, and it is not, that would not be a valid ground for the granting of federal injunctive relief in these circumstances**

Even if the seizure herein were unconstitutional (and it was not), respondents would still not be entitled to the negative relief of a restraining order or the affirmative relief of a mandatory injunction ordering turnover of the film, in the absence of a massive and imminent threat of a protracted and pervasive suppression of First Amendment rights of the type involved in *Dombrowski* v. *Pfister* (380 U.S. 479).

There involved was an unconstitutional statute, and various searches and seizures conducted thereunder by a prosecutor actuated by bad faith (within the meaning of this Court's definition of that phrase in the recent case of *Cameron* v. *Johnson* (390 U.S. 611—April 2, 1968) ) as referring to a prosecutory situation in which the prosecutor initiates a criminal proceeding *with no expectation of conviction.*

There is no allegation to this effect in the motion papers or complaint and the respondents have wholly failed to plead any facts, ultimate or particular, showing bad faith.

So too, there has been no claim here that either the New York Obscenity Statute or Search Warrant Procedural Statute are invalid on their face.

Thus, their complaint and motion papers are fatally defective (see *Zwicker* v. *Boll*, 391 U.S. 353; *Spielman Motor Sales Co.* v. *Dodge*, 295 U.S. 89).

Moreover, respondent corporation is a mere licensee of the film in question and not its owner (as was admitted in the complaint and motion papers, and on previous argument), and there is no allegation in the complaint or motion papers that the respondent corporation (to whose representative the film has been ordered returned in the judgment herein) ever intends to show the film again, it having been seized on the last night before the last performance of its scheduled run at the Bethview Theatre.

In any event, the respondents have stipulated, as a condition of obtaining the relief provided in the judgment, that they would not show the said film during the period of the State Criminal Trial and until the entry of judgment therein. This means that the judgment's effect will not *be* to prevent irreparable damage to plaintiff corporation, but rather to decree that the film in question should reside, until the scheduled trial date in a drawer in the office of the representative of respondent corporation rather than in a drawer in the District Attorney's Office.

The mere fact that a State Court commits constitutional error, in the absence of an allegation that it occurs under color of a statute void on its face, and the further allegation that the film in question is not obscene and is thus protected by the First Amendment, does not constitute a sufficiently clear or substantial threat to either First Amendment rights or financial interests to justify the awesome invocation of the drastic federal injunctive remedy so as to disrupt ongoing State Criminal Proceedings.

Thus, in view of the foregoing, the judgment herein should be reversed because it grants idle relief, rather than protecting from the imminent danger of irreparable damage and thus interferes in pending State judicial pro-

ceedings in violation of the rule of *Steffaneli* v. *Minard*, (342 U.S. 117), and offends established principles of equity which forbid the granting of injunctive relief, even in First Amendment cases, except to prevent irreparable damage (*Dombrowski* v. *Pfister*, 380 U.S. 479; see also *Potwora* v. *Dillon*, 386 Fed. 2d 74, 2d Cir., where Judge Friendly held that the traditional limitations on equitable relief apply in circumstances such as these) or to vindicate really substantial interests (see such cases in every jurisdiction as *People ex rel. Corwin* v. *Walter*, 68 N.Y. 403, 408, holding that a court will not grant an idle or academic remedy).

Certainly, the objective served by the relief of turnover of the film copy in question for a few days to plaintiff corporation, while barring plaintiff corporation from showing it, is not substantial enough to justify the risks involved in the disruption and interruption of the District Attorney's continuity of possession of the film evidence. Loss of possession might effectively defeat the prosecution herein, and thus, the order of turnover would seem violative of 28 U.S.C. 2283 which bars the granting of federal injunctive relief to stay proceedings in a State court.

The rule of comity, which forbids judicial interference in State judicial proceedings, has been applied to deny relief in cases where the plaintiff sought to rely on the Civil Rights Act of 1871 (42 U.S.C. 1983). (See *Stefanelli* v. *Minard, supra; Fuqua* v. *United Steelworkers*, 253 F. 2d 594, 6th Cir.; *Progress Dev. Co.* v. *Mitchell*, 182 F. Supp. 681, N.D. Ill.; rev. on oth. gro. 281 F 2d 222, 7th Cir.) Such statutes, where irreparable injury is shown (i.e. a burden beyond that involved in an ordinary criminal prosecution), may permit injunctions against State prosecutions where no pending, imminent proceeding is involved. But, where a prosecution is *commenced*, the public policy of cooperative federalism prohibits interference with the State proceedings.

And even where a proceeding is not pending but only threatened or prospective, comity, as well as traditional equitable principles, will bar an injunction against the prosecutor in the absence of a showing of irreparable damage to monetary interests (*e.g.* see *Ex parte Young*, 209 U.S. 123, at 144, involving a prohibitive fine for failure to pay confiscatory railroad rates) or irreparable injury to First Amendment rights (*Dombrowski* v. *Pfister*, 380 U.S. 479; *Douglas* v. *City of Jeannette*, 319 U.S. 157) stemming from threatened enforcement of a statute unconstitutionally repressive on its face to the exercise of First Amendment rights because of overbreadth whose enforcement threatens *widespread* suppression of such rights (see *Dombrowski* v. *Pfister, supra; Zwickler* v. *Koota*, 389 U.S. 241).

As we have seen, only a massive illegal seizure of the type involved in A Quantity of Copies of Books v. Kansas, would render comity's rule of non-interference inoperative. A seizure of only one item, for evidence, even if unconstitutional, would not constitute such a substantial and imminent threat of injury to First Amendment rights as would justify a federal court in forsaking the rule of comity (and the weighty considerations of public policy which lie behind it) in deference to the countervailing interests enshrined in the First Amendment.

In *Dombrowski* v. *Pfister, supra*, Mr. Justice Brennan, speaking for the Court, declared on page 484:

> "... It is generally to be assumed that state courts and prosecutors will observe constitutional limitations as expounded by this Court and that the mere possibility of erroneous initial application of constitutional standards will usually not amount to the irreparable injury necessary to justify a disruption of orderly state proceedings."

It is true that this Court's decision in Dombrowski then proceeded to carve out a narrow category of exception to this anti-injunction policy, but the *Dombrowski* court

granted relief in a situation which was fundamentally different from that in the instant case on the basis of a complaint framed on an entirely different theory.

There is absent from the circumstances of this case those special factors which would place this case in that narrow category of exception established in *Dombrowski.*

As is clear from a reading of *Dombrowski*, its special doctrine requires for its invocation that a situation be presented in which the applicant shows (1) a full-fledged program of harassment by State authorities (of members of a civil rights organization employing the devices of free expression to win negroes their constitutional rights) which aims at and, in effect, achieves a substantial impairment of freedom of expression of a type clearly and obviously within the protection of the First and Fourteenth Amendments; (2) that the harrassment consisted of patently illegal arrests, searches and seizures and threatened criminal prosecutions to be initiated under an unconstitutional statute, overbroad in scope and void for vagueness; (3) that there is no remedy in State law other than protracted State litigation in a judicial system prejudiced against negro causes, thus seriously delaying the free exercise of important personal rights of expression directed to the betterment of the negro race.

The peculiar preconditions to the operation of the Dombrowski rule are obviously *not present in this case nor are they alleged in the complaint herein.*

Moreover, in Dombrowski, the Federal Court injunction had issued before the Grand Jury had convened or voted an indictment, and, thus, for the purposes of 28 U.S.C. 2283, the Federal Anti-Injunction Statute, no "proceedings" existed to bar the interference of the Federal Court. Again, the contrast with the instant case is obvious.

Thus, even if the seizure herein was illegal, and it is not, the granting of the mandatory injunctive relief of an order directing the return of the seized film would not be justified under the rationale of Dombrowski.

On the allegations of the complaint in our instant case, it is impossible to conclude that the plaintiffs have been threatened.

> "With any injury other than that incidental to every criminal proceeding brought lawfully and in good faith, or that a federal court of equity by withdrawing the determination of guilt from the State courts could rightly afford petitioners any protection which they could not secure by prompt trial and appeal pursued to this court (Douglas v. City of Jeannette, 319 U.S., at 164)."

Furthermore, in *Dombrowski*, the Supreme Court was protecting expression clearly and patently protected under the First Amendment.

A different situation is presented on prosecutions under obscenity statutes. Here the federal court can not determine whether the film or book in question is protected-expression until it conducts a full-fledged obscenity trial including the testimony of experts, etc. Thus if this Court sets a precedent decreeing an activist role for the federal judiciary in this regard, State obscenity prosecutions will then involve two trials, one in federal court and one in State court, or, if the federal court finds the work to be protected, the federal trial will have replaced a state trial.

Such an approach will not serve the underlying objective of *Dombrowski*: that of protecting a party from the burden of prolonged judicial proceedings. Indeed, in many cases, it will add to his burden both in time and financial cost, while, at the same time, it imposes onerous new strains on an already over-burdened federal court system. It is not unreasonable to expect that under such an interventionist

regime, the federal court system, will literally be overwhelmed with prolonged hearings designed to determine the good or bad faith of the State prosecutor and the obscene or non-obscene character of the work in question.

The above analysis seems applicable in various procedural contexts, *e.g.* (1) where a negative injunction is sought restraining a threatened state prosecution on the ground that the prosecutor is restricting the exercise of First Amendment rights or suppressing material allegedly entitled to First Amendment protection by threatening in bad faith, to prosecute under a statute unconstitutional on is face if the plaintiff attempts to show a film or sell printed materials claimed by the prosecutor to be obscene; (2) where a mandatory injunction ordering affirmative relief is sought to obtain return of a single item of allegedly obscene expressionary material conceded to have been seized illegally pursuant to a warrant issued without a prior adversary hearing (assuming, arguendo, for the sake of this hypothesis, that such a hearing is necessary with respect to the seizure of a single item, and it is not) or, *e.g.*, pursuant to a warrant too vague in its description of the item to be seized or based upon an affidavit which is inadequate in factual statement.

In either of these circumstances, it might well be held by the Federal Court in which such an application is brought that a hearing is necessary to enable it to determine whether the item or material suppressed or seized is protected expression safeguarded under the First Amendment or is obscenity.

It would appear clearly necessary to inquire into the character of the material in an example such as that described in paragraph (1) above, provided the allegations of the complaint are legally sufficient, even assuming for the moment, without conceding, that it would not be necessary for a federal court contemplating injunctive relief to evaluate the character of the material in a situation such

as that in "A Quantity of Books v. Kansas", (*i.e.* a *mass* seizure of expressionary matter) without an adversary hearing.

Moreover, if the thesis championed herein is sound, it might well be considered necessary to make such an inquiry in a situation like that described in the example given in paragraph (2) above. If federal relief does not follow automatically in the case of an *illegal* seizure of a *single* copy of expressionary material for evidentiary purposes (and we know that it does *not* follow at all, where the seizure involves evidentiary objects not protected by the First Amendment; see *Stefanelli* v. *Minard,* 342 U.S. 117 and *Cleary* v. *Bolger,* 371 U.S. 392) then, presumably the doctrinal facet of the Kansas mass-seizure precedent, declaring the character of the material to be irrelevant (if, inferentially it is obviously, on its face, expressionary material designed for circulation) also does not apply.

In other words, the Supreme Court has said that a mass seizure amounting to total suppression of material obviously containing expressionary content in form for distribution to the public is so fraught with peril to First Amendment freedoms, that unless the seizure was preceded by an adversary hearing, it is unconstitutional regardless of the obscene or non-obscene character of the material.

However, as we have seen, the seizure of a single copy of an item of expression is not so charged with possibilities of danger and thus the character of the material might well be in issue. To hold differently would be to argue that although the single copy may be obscene and not entitled to First Amendment protection, the Federal Court should intervene to order its return to the owner without inquiring whether the material is within the shelter of First Amendment guarantees.

If such becomes the ruling principle, then the Federal District Court will indeed have become, in effect, a State Court passing on motions to suppress evidence.

Such a principle would also be inconsistent with the cases cited herein which indicate that before injunctive relief may issue with respect to illegal prosecutory action threatening or suppressing First Amendment rights, imminent danger of irreparable damage to First Amendment rights must be shown. Obviously such danger to First Amendment rights cannot be shown in the single copy seizure situation unless the First Amendment is shown to be implicated by a demonstration that the material is a type *protected by the* First Amendment.

In the Kansas case, this Court, in reversing a State judgment in a civil forfeiture action, said, in effect, that the State's ex parte court order procedure was invalid regardless of whether the material seized was or wasn't obscene.

However, the Court did not say that a federal injunction interfering with a State proceeding *before it had gone to judgment,* would have been authorized in such circumstances or that the question of whether the works seized were or were not obscene would be irrelevant in such circumstances.

In other words, even if the seizure without adversary hearing were grounds for reversal *on appeal* from a State judgment of civil forfeiture, that would not justify a federal court in enjoining *an ongoing* State proceeding from adjudicating the question of the legality of the seizure and determining whether the seized objects should be returned.

Thus, in Kansas, the Supreme Court was declaring the doctrine which should guide State courts in proceedings issuing in civil forfeiture judgments; in so doing, it gave no authorization whatsoever to federal courts to intervene in State proceedings *in progress.* (*Potwara* v. *Dillon, supra*).

Moreover, even if the Kansas case could be read as permitting such federal intervention in a State civil for-

feiture proceeding whose judgment authorizes the total and large scale destruction by burning of the mass of materials seized, it could not be inferred from such permission that a federal district court was similarly authorized to intervene in a State *criminal* proceeding, since such a proceeding, at least in New York State, does not culminate in a decision authorizing the destruction of seized materials or ordering them suppressed and barred from circulation.

But even if a federal injunction could properly issue to interfere with an ongoing State criminal proceeding, one of the factors which should guide the federal court's discretion in determining whether to disrupt the State prosecution *in that particular instance* is the extent to which First Amendment rights have been suppressed or threatened.

Obviously, *e.g.*, if the material is obscene and thus not protected by the First Amendment, *or* if it is protected, *but* only one copy of a book was seized, with many other copies of the same work circulating, *or* the owner did not intend to disseminate it (within the meaning of the "threshhold of dissemination" *Mishkin* criterion), the threat to First Amendment liberty is not so broad and immediate that a federal court must hasten to intervene at once so as to prevent the issue of the seizure's legality from being settled in the normal course of the State proceeding, and, if necessary, by appeal to the United States Supreme Court.

As was held in *Dombrowski* v. *Pfister* (380 U.S., at 484), error in a State's application of constitutional standards will not usually justify federal intervention in State judicial proceedings. Before a Federal court is justified in interposing the overriding authority of its Writ, the error must pose an imminent threat of widespread and protracted suppression of First Amendment rights in a judicial system so prejudiced or irregular in its processes that relief in the normal course of the State trial and appellate process is impossible.

Federal intervention in such unusual circumstances is clearly justifiable since the State procedures, having been obstructed and rendered inoperative, in effect, do not exist at all. That is hardly the situation in the instant case and thus it can scarcely be claimed that this Court, either expressly, or impliedly, has approved wholesale federal interference in ongoing State criminal proceedings, in circumstances such as these.

This Court, in *Dombrowski,* never contemplated such possibilities, and it is plain from its recent decision on May 20, 1968 in *Zwicker* v. *Boll* (391 U.S. 353) that it does not look with favor upon a judicial approach that uses the *Dombrowski* decision to impose added burdens on the federal courts.

In *Zwicker* v. *Boll,* the appellants were students at the University of Wisconsin active in student political and civil rights organizations. They brought an action in the federal district court seeking declaratory and injunctive relief against the District Attorney of the county on the claim that *pending* State criminal prosecutions against them under a disorderly conduct statute should be enjoined on the grounds that (1) the statute was void on its face for overbreadth and (2) that the arrests were made in prosecutions instituted for the purposes of harassment and in a discriminatory manner on account of their political beliefs.

A three judge court was convened and dismissed the complaint after oral argument, but without conducting an evidentary hearing. One judge in the majority of two based his decision for dismissal on his belief that 28 U.S.C. 2283 barred the granting of an injunction. The other judge in the majority found it unnecessary to reach that question, instead abstaining in favor of the State criminal proceedings.

This Court affirmed the judgment in a per curiam decision on the authority of *Cameron* v. *Johnson,* 390 U.S. 611.

Mr. Justice Douglas, in a forfeiture dissent, stated that, in his view, the appellants had adequately alleged in their complaint that their arrests and prosecutions were effected in bad faith and in a discriminatory manner in order to punish and discourage the exercise of constitutionally protected rights. He argued, in effect, that instead of dismissing the complaint, the Court below should have conducted a hearing on the question of bad faith.

Justice Douglas' opinion set forth the text of the allegation of the complaint respecting bad faith and also discussed other objective indications in the sequence and structure of events which gave a strong suggestion of harassment. The allegations in the Zwicker complaint, unlike the pleading herein, were detailed and impressive; and yet even on a pleading so much stronger than the instant complaint as the one in *Zwicker,* this Court sanctioned dismissal without the convening of a hearing on the issue of bad faith.

This recent pronouncement from this Court in *Zwicker* emphatically reflects the Court's determination to restrict the granting of injunctive relief against State criminal proceedings to that very narrow category of situations which involve the factors which were present in the *Dombrowski* case, and perhaps in the *Quantity of Books* v. *Kansas* situation (although that case did not deal with the issue of federal injunctive relief against State judicial proceedings in progress; the proceeding in Kansas, having gone to judgment, was not interrupted by the federal writ). It *is perfectly plain that if the Court would not approve federal intervention in Zwicker, it would definitely not approve it in this case.*

Realistically speaking, there is no need for federal judicial intervention here. The accused parties (respondents in this proceeding) were arrested on May 6, 1969 on the basis of arrest warrants and an Information executed that day. They were scheduled to go on trial on May 21, and

on May 26, 1969 and then the trial was postponed to June 13 at the request of respondents herein. The State suppression hearing was held in advance of the trial. Thus, the case was dealt with quickly and without delay. Therefore, injunctive relief should not be granted (Stevens v. Frick, C.A.N.Y. 372 F 2d 378, cert. den. 387 U.S. 920). In fact, the respondents herein sought a temporary injunction and the prosecution was not suppressing respondent corporation's business, but, on the contrary, was prosecuting only with respect to one film whose run was finished anyway.

Therefore, if Federal District Courts grant relief in such circumstances as these, they will be acting as reviewing courts with respect to State obscenity prosecutions. Not only that, but they will be exercising its review *prior* to the State trials, rather than after them, an unheard of methodology of review and one totally inconsistent with the ideal of inter-judicial comity and the equal dignity of the federal and State judicial establishments.

Such an approach would make State courts, which have the only responsibility for State obscenity law enforcement (and, indeed, all State criminal law enforcement) subordinate to federal courts which have no responsibility for local law enforcement under our constitutional scheme of divided sovereignty.

It would also create a situation where the Federal District Courts might largely displace or overshadow this Court as the important agency of federal judicial review.

This Court should not establish such a momentous and heterodox precedent, especially in the face of this Court's recent expression of view to the contrary in *Zwicker* v. *Boll, supra.*

One thing seems certain. The exercise by a federal court of such detailed superintendence of State judicial proceedings is utterly inconsistent with this Court's holding in *Stefanelli* v. *Minard* (342 U.S. 117)—that the federal

judiciary should refrain from such intrusions on State judicial prerogatives as may offend the dignity of State courts and disrupt the delicate balance of responsibility and authority between these two coordinate judicial systems.

It would work a revolutionary transformation in the relationship between these systems, one totally incongruent with the theory of local *residual power* reflected in the specific provisions and the *internal logic* of the United States *Constitution* and the *federalistic conception of the national judicial power deducible from the rhetoric of the Judicial Article of the Constitution.*

It is true that in the case of *Zwickler* v. *Koota,* (389 U.S. 241-1967) the Supreme Court held that where a State statute (there a law prohibiting anonymous distribution of political handbills) is attacked on First Amendment grounds as unconstitutional *on its face* for *overbreadth,* a District Court has no discretion to abstain and should decide the federal proceeding one way or the other on the merits.

The facts of this case, however, are crucially different and do not bring it within the *Koota* rule. Here the complaint does not attack the statute in question as unconstitutional on its face, alleging instead that it is *applied in this particular case* as a means of harassment. Moreover, in *Koota,* a prosecution was threatened but was not pending and thus the bar against enjoining pending proceedings contained in 28 U.S.C. 2283 did not operate there. Since the statute herein is not attacked as invalid on its face, plaintiffs necessarily rely on the theory of bad faith-harassment. Thus they must allege all the significant features of *Dombrowski* with respect to harassment, such as prosecutory prejudice, judicial hostility, etc. This they have not done.

Even if §2283 *supra,* were not a bar to the granting of injunctive relief in this case, there is still a well established principle of public policy that, on ground of comity, it is more offensive to infringe the prerogatives of a Court that has acquired jurisdiction (*Peck* v. *Jeness,* 48 U.S. (How) 612, 624; *Hagan* v. *Lucas,* 35 U.S. (10 Pet) 400, 403; *Stefanelli* v. *Minard,* 342 U.S. 117, 120) by enjoining a participant in a pending proceeding, as in this case, than to enjoin an official (as in *Koota*) who has not instituted a proceeding. The latter situation raises less weighty questions of comity between separate State and federal *judicial* establishments, than does this case. Thus abstention is appropriate here.

Moreover, in *Koota,* the exercise of freedom of the press involved was obviously a protected type of freedom, something which can not be said of the type of expression in question in this case. Here a federal court would be required to conduct an obscenity trial if it did not abstain in which it would view the film "Odd Triangle" and hear expert testimony as to social value, etc.

Furthermore, unlike *Koota,* failure to abstain in this case would necessitate an extensive hearing as to the alleged "bad faith" referred to in the conclusory allegations in the complaint. This would follow from defendants claim that mere illegality of the seizure herein (and it was not illegal would not per se justify the granting of a mandatory injunction ordering turnover of the film.

In the light of the foregoing, it is clear that the *Koota* case does not constitute an obstacle to federal court abstention in this case.

***Moreover, Koota merely decreed that the District Court should reach the merits of that case. It affords no guidance as to whether relief should or should not be granted in this case, if this Court were to reach the merits.***

Furthermore, the respondents' charge that the film was seized by an unconstitutional procedure is irrelevant on the issues of (a) whether the District Court should have abstained from addressing the issue of whether the prosecution should be enjoined; and (b) if not, whether a temporary or permanent injunction would lie in this case.

This prosecution was not based on the seizure, but rather, on the public viewing of the film at The Bethview Theatre by Detective Lang, the executor of the Information. The film was seized *after* this public viewing, so the issue as to whether it was properly seized would be an evidentiary question to be decided in the State trial; it has no bearing on whether the prosecution is or is not conducted in good faith and should or should not be enjoined. Therefore, even if such a seizure without adversary hearing was illegal, that is no ground for enjoining the prosecution. Indeed, the prosecutor at the State trial could subpoena the film or other copy of it without any seizure at all, although there would be no guarantee that the same film would be produced at the trial, and although of course, there is no guarantee the subpoena would be honored. The District Court seems to have agreed with this analysis since, in its findings of fact, it declared that there was no cause to enjoin the prosecution. However, the Court did not act upon this finding since it did not include in the Ordered portion of the judgment a provision denying this injunctive relief. Thus, petitioners here appealed from the judgment for this reason as well as for the reason that it ordered returned to respondent corporation the film.

Under the circumstances of this case, since respondents intend to show the film, that portion of the complaint complaining of the constitutionality of the search warrant procedure, merely seeks, in effect, to enjoin or at least make more difficult, the use of evidence in a State trial rather than to protect the First Amendment right to show the film, and a federal injunction will not issue for this purpose. (*Stefanelli* v. *Minard*, 342 U.S. 117; *Pugach* v. *Dollinger*, 365 U.S. 458; *Lebowich* v. *O'Connor*, 309 Fed. 2d 111—2d Cir.; *Cleary* v. *Bolger*, 371 U.S. 392).

If this prosecution were based on a statute providing for pre-performance censorship and charged a violation of the statute by failure of the theatre to get a permit before the showing (and it does not), the prior restraint issue might have been presented. In the circumstances of this case, it is not presented.

The complaint herein did not allege that the petitioner District Attorney was threatening to prosecute an existing show or one that is planned for the future; or threatening future seizures, indeed, there was no allegation in the complaint that the corporate-plaintiff intended to run the film beyond the date on which a copy of it was seized or intended or wished to have a further run of the film "Odd Triangle" in the future or will have the film in its possession in the future. (The respondents merely alleging in paragraph 6 of the complaint that the plaintiff corporation "had been exhibiting" the film.)

Thus the complaint does not allege facts showing the existence of a justiciable controversy and, in effect, asks the Courts to act in excess of the authority granted under the Judicial Article of the Constitution and applicable judicial statutes which restrict the national judicial power to "cases and controversies".

A decision by this Court on a complaint such as this would be an idle exercise or, at most, an advisory opinion in response to a complaint which merely poses an academic question. At the very least, the deficiencies in the allegations in this connection necessitate a denial of plaintiffs' demand for *temporary* injunctive relief, since there is no ongoing exercise of free expression which needs protection pending decision of this case. The *Dombrowski* case is clearly distinguishable in this respect. There the Supreme Court approved the issuance of a federal court injunction in a situation where the prosecutor was threatening to enforce an overboard statute in order to silence *existing continuing* exercises of First Amendment freedom. Thus in

that case (unlike this one) it could really be said that unless an injunction was granted, First Amendment liberties would be suppressed.

Respondents asked that the particular pending prosecution against them be stayed and the seized film returned to them, but such a stay of a proceeding already initiated would not protect their future freedom of expression. Thus such a stay, in addition to the other objections which could be raised against it, would be an idle remedy and a court will not grant relief which is idle or academic (*People ex rel. Corwin* v. *Walter*, 68 N.Y. 403, 408; *Daniman* v. *Board of Education*, 23 Misc. 2d 664).

That this analysis would find agreement in this Court seems clear. In the landmark cases in which the Court indicated approval of the injunctive remedy *Dombrowski* v. *Pfister* and *Zwickler* v. *Kotta*, *supra*), no prosecution had been instituted but it was alleged that the *threat* of future prosecutions would restrict a *future* course of free expression. Thus even apart from the statutory prohibition against enjoining pending proceedings contained in 28 U.S.C. 2283, it may be stated on practical grounds (relating to the principle that injunctive relief should issue only where it is an effective and not idle remedy) that at most only *threatened future* prosecutions ought to be the subject of injunctive relief in circumstances such as these. And even this type of injunction should not issue here for the reasons cited in this memorandum in the discussion of the complaint's insufficiency of statement and in the discussion of other factors mitigating against the granting of injunctive relief in this case.

Thus, it is clear that the District Court should have abstained from rendering a decision on the merits of this case, and should have dismissed the complaint, or, at the very least, should have dismissed the complaint for failure to state a claim and for failure of subject-matter jurisdiction.

Moreover, the complaint contained not one single mention that a lens or movie trailers (advertisements of coming attractions) were seized, let alone allegations of ultimate fact showing that they were seized *illegally*, and the Wherefore clause does not ask for any relief with respect to such items. Yet the judgment orders their return, and thus, in this regard, goes beyond the scope of the complaint. It follows that this portion of the judgment would clearly be reversible, even if the rest were not. The lens was not mentioned in the search warrant and was seized incidental to the arrests herein. No trailers were seized at all on May 6th, when the arrests were made; only the film "ODD TRIANGLE" was seized. There were trailers seized earlier this year—in February—in an entirely different case, but no allegation is made in the complaint or motion papers about this earlier seizure (let alone that it was illegal).

The trailers, being advertisements rather than organic works of art, are not protected by the First Amendment (see *Valentine* v. *Chrestenson*, 316 U.S. 52) and thus are not returnable under plaintiffs' First Amendment claim. The lens is similarly not protected by the First Amendment, since it is not a work of art or expression, and it was clearly seizable as the means or instrumentality of the crime. Its seizure is also authorized under Section 410.00 of the New York Penal Law.

It is obvious from the foregoing analysis and a reading of the complaint that the complaint does not allege facts showing the existence of a justiciable controversy or demonstrate that the respondents have standing to sue herein or are aggrieved parties or real parties in interest entitled to seek the relief they demand. Respondents wholly fail to present for protection an ongoing exercise of free expression such as would properly invoke the decisional power of the federal judiciary.

In the light of the above analysis, it is submitted, with all respect, that the judgment herein is fatally defective and should be reversed by this Court.

Indeed, in view of the profound implications of public policy and the weighty claims of state procedural values, a decision by this Court on this proceeding is vitally necessary.

**3. There is apparent disparity of decisions within the Second Circuit with respect to whether or not a prior adversary proceeding on the issue of obscenity is required prior to authorized seizure**

In our instant case, the Court of Appeals for the Second Circuit took the basic position in their decision of October 6, 1969 that a prior adversary proceeding was required on the issue of obscenity of a film even though a judge viewed the film and then issued warrants of arrest and seizure.

In another case, yet unreported officially, from the United States Court of Appeals for the Second Circuit, decided on October 29, 1969 (*United States of America* v. *Wild and Corrado*—F. 2d—, Vol. 162 N.Y.L.J. No. 104, December 1, 1969, pages 1, 4 and 5), indictments for conspiracy to use the mails for conveyance and delivery of obscene color slides and photographs and information were handed up. Bench warrants following the indictment were issued and the appellants were arrested thereunder and pursuant to which searches and seizures of the respective apartments of appellants took place.

These searches of course produced evidence of what was ultimately found to be obscene slides or pictures.

A suppression hearing was held in the case. The appellants, however, were convicted of violating the Comstock Act (18 U.S.C. Sec. 1461).

On appeal to the Second Circuit, the appellants claimed that these items seized should have been suppressed.

With regard to this claim, the United States Court of Appeals stated:

> "In conjunction with the specific claim that the items seized should have been suppressed, appellants present a broader argument that seizures in an obscenity case without a prior adversary hearing on the issue of obscenity are unconstitutional under A Quantity of Books v. Kansas (378 U.S. 205, 1964) and Marcus v. Search Warrants (367 U.S. 717, 1961). These cases are inapposite since they involved massive seizures of books under state statutes which authorized warrants for the seizure of obscene materials as a first step in civil proceedings seeking their destruction. The seizures in this case were of instrumentalities and evidence of the crime for which appellants were indicted and lawfully arrested. We do not believe Marcus and A Quantity of Books can be read to proscribe the application of the ordinary methods of initiating criminal prosecution to obscenity cases (see Milky Way Productions, Inc. v. Leary, New York Feed Co., Inc. v. Leary,—F. Supp. —, S.D.N.Y., Oct. 15, 1969, three-judge court, mimeographed copy of opinion, pp. 18-22)."

Thus, the Court held that the seizures of the slides involved were the product of searches incident to lawful arrests and that the seizures were deemed to be instrumentalities and evidence of the crimes for which appellants had been indicted.

So, too, the Court refused to proscribe application of ordinary methods of initiating criminal prosecutions in obscenity cases.

In contrast, the instant case reveals that the Magistrate viewed the film involved here and issued arrest and search warrants and it is respectfully submitted that there should be no difference between the seizure of color slides without prior adversary hearing on the issue of obscenity and the seizure of the print of a motion picture film pursuant to a search warrant issued by a Magistrate who had viewed the film.

Such a procedure followed in our instant case should be deemed an application of an ordinary method of initiating criminal prosecution to obscenity cases and should not be proscribed by cases involving a massive seizure of books.

**4. Review of the issues in this matter are of extreme importance to law enforcement**

In view of all of the foregoing matters set forth, it is axiomatic that it is extremely important to law enforcement agencies, especially in New York State, to have some means by which the chief evidence of obscenity with relation to a motion picture film can be preserved for purposes of trial.

In this connection it is manifested in our instant case that a jury of the respondent-corporation's peers found it guilty of violating New York State's obscenity laws and inferentially found the film "ODD TRIANGLE" obscene.

This may not have been the case in the recent ruling of this Court which denied certiorari in Case No. 409, *Wilkinson* v. *Tyrone, Inc.*, 6 Cr. L. 4093.

## CONCLUSION

**For all of the foregoing reasons, this petition for a writ of certiorari should be granted.**

Respectfully submitted,

WILLIAM CAHN
District Attorney, County of Nassau
*Counsel for Petitioners*
County Court House
262 Old Country Road
Mineola, New York

GEORGE DANZIG LEVINE,
JULES E. ORENSTEIN
Assistant District Attorneys
*of Counsel*

December 23, 1969

# APPENDIX A-1

(Opinion of Court of Appeals, Second Circuit)

UNITED STATES COURT OF APPEALS

For the Second Circuit

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No. 724—September Term, 1968.
(Argued July 24, 1969 Decided October 6, 1969.)

Docket No. 33799

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Bethview Amusement Corp., George Hall, Ruth Bakey, Clyde Bruce, Tom Cuccarole and Richard Halback,

*Plaintiffs-Appellees,*

v.

William Cahn, District Attorney for Nassau County, State of New York, Richard Delin, Chief Assistant District Attorney for Nassau County, State of New York, John Lang, Detective Sergeant, Nassau County Police Department,

*Defendants-Appellants.*

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Before:

Waterman and Hays, *Circuit Judges,*
and Bartels, *District Judge.**

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Appeal from an order of the United States District Court for the Eastern District of New York, Anthony J. Travia, *Judge,* directing defendants to return to plaintiffs a print of a motion picture film entitled, "Odd Triangle," seized by police officers under the control of the defendants as being obscene.

Affirmed.

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* Of the Eastern District of New York, sitting by designation.

*Appendix A-1*

MORTON ALPERT, New York, New York (Alpert & Rosenberg, New York, New York), *for Appellee Bethview Amusement Corp.*

JEROME S. RUBENSTEIN, New York, New York, *for Appellee Cuccarole.*

GEORGE D. LEVINE, Assistant District Attorney of Nassau County, Mineola, New York (William Cahn, District Attorney of Nassau County, Mineola, New York), *for Appellants.*

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HAYS, *Circuit Judge*:

This is an appeal from an order of the United States District Court for the Eastern District of New York, directing the return to appellees of a print of a motion picture film entitled "Odd Triangle" seized by police officers under the control of appellants as being obscene. We affirm the order of the district court.

There is no controversy as to the facts. Bethview Amusement Corp. is the owner of a motion picture theater known as Bethview Theatre located in Bethpage, Nassau County, New York. On May 6, 1969 the theater was exhibiting a film called "Odd Triangle." Nassau County police officers under the direction of appellants seized the film and arrested the plaintiffs, who were employees of Bethview. The appellees were charged with the crime of "Obscenity" under Section 235.05(1)(2) of the Penal Law of the State of New York. The police officers who seized the film and made the arrests had search and arrest warrants issued on the application of appellants by Judge Marchese of the District Court of Nassau County, who had seen the film before issuing the warrants.

The appellees brought an action in the United States District Court for the Eastern District of New York and in connection therewith sought a preliminary injunction ordering the return of the film. The defendants appeal from the injunction ordering the film's return.

*Appendix A-1*

We are not called upon to decide whether the film was in fact obscene. The only issue raised is whether the protection provided by the first amendment required that appellees be given an opportunity to be heard on the issue of obscenity before the film could be seized by the police. We hold that the first amendment as applied to the states by the fourteenth requires an adversary hearing in such a case.

There can be no doubt that a motion picture, like a book, is entitled to the protection of the first amendment. *Joseph Burstyn, Inc.* v. *Wilson,* 343 U.S. 495, 501-03 (1952); *Interstate Circuit, Inc.* v. *City of Dallas,* 390 U.S. 676 (1968); *United States* v. *A Motion Picture Film,* 404 F. 2d 196 (2d Cir. 1968). That protection includes the requirement that an adversary hearing be provided before the allegedly obscene works can be seized.

"We conclude that in not first affording . . . an adversary hearing, the procedure leading to the seizure order was constitutionally defective. . . . For if seizure of books precedes an adversary determination of their obscenity, there is danger of abridgement of the right of the public in a free society to unobstructed circulation of non-obscene books." *A Quantity of Books* v. *Kansas,* 378 U.S. 205, 210-11, 213 (1964). See also *Marcus* v. *Search Warrant,* 367 U.S. 717 (1961); *Potwora* v. *Dillon,* 386 F. 2d 74 (2d Cir. 1967).

Appellants argue that there is a difference between the seizure of a large number of books and the seizure of a single print of a motion picture film. We do not agree that the difference is legally significant. We are told that the Bethview Theatre has 300 seats. Assuming half of them to be occupied for four showings of a film each day for a week, over 4,000 individuals would see the film. Preventing so large a group in the community from access to a film is no different, in the light of first amendment rights, from

preventing a similarly large number of books from being circulated.

We are supported in our view that the rule of the *Kansas* case is equally applicable to seizure of films by the recent decisions of sister circuits in *Metzger* v. *Pearcy*, 393 F. 2d 202 (7th Cir. 1968) and *Tyrone, Inc.* v. *Wilkinson*,—F. 2d —(4th Cir. 1969). In *Metzger* the court said at p. 204:

> "This analysis [of the Supreme Court cases] requires this court to hold unconstitutional the seizure of the film 'I, a Woman' since there must be an adversary hearing on the issue of obscenity before a movie can be constitutionally seized."

The appellants contend that a print of the motion picture is needed for purposes of prosecution. There are a number of ways in which this can be accomplished without seizure of the film. The court can direct that a print be made reasonably available to the prosecution; a subpoena duces tecum can be used.

Finally it is suggested that unless the police or other local authorities have actual possession of the film pending the required adversary proceeding, the distributor may take advantage of the delay, for example, by shipping the film out of the jurisdiction or by cutting out the offending scenes. If there is a real threat of such activity it can be controlled by an ex parte restraining order.

Affirmed.[1]

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[1] The order of the district court prohibited exhibition of the film pending trial of the obscenity charge. Since there was no cross-appeal we express no opinion on this portion of the order.

# APPENDIX B-1

(Order of Travia, *D. J.*)

UNITED STATES DISTRICT COURT

Eastern District of New York

Civ. Act. No. 69 C 491

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Bethview Amusement Corp., George Hall, Ruth Bakey, Clyde Bruce, Tom Cuccarole and Richard Halback,

Plaintiffs,

*against*

William Cahn, District Attorney for Nassau County, State of New York, Richard Delin, Chief Ass't District Attorney for Nassau County, State of New York, John Lang, Detective Sergeant Nassau County Police Department,

Defendants.

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Upon reading and filing the Order to Show Cause, dated May 12, 1969, the supporting affidavit of David H. Isacson, sworn to May 12, 1969 and the verified complaint dated May 12, 1969, all in support of plaintiffs' motion for a preliminary injunction requesting relief that (1) defendants should return to plaintiffs the print of the film "Odd Triangle", trailers and a lens heretofore seized and retained by defendants on May 6, 1969, (2) restraining defendants from prosecuting plaintiffs, and (3) restraining defendants from further seizures of said film; and upon reading and filing the affidavit of defendant Richard Delin, sworn to May 20, 1969 in opposition to said motion and in support of defendants' cross-motion to dismiss the complaint; and this motion having come on to be heard on May 20 and 28, 1969; and the court having heard the arguments of counsel for both sides; and upon the annexed representation and stipulation of David H. Isacson in behalf of plain-

tiff, Bethview Amusement Corp., the Court makes the following disposition:

FINDINGS OF FACT

(1) This Court has jurisdiction over the subject matter of this case and over the parties.

(2) Plaintiff, Bethview Amusement Corp., is the licensee of a print of the film "Odd Triangle" which on May 6, 1969 it had exhibited to the public at its theatre known as Bethview Theatre in Old Bethpage, New York.

(3) On May 6, 1969 defendants or their agents, acting on search and arrest warrants issued on an ex parte application by them, seized said print of the film "Odd Triangle" at the Bethview Theatre and now hold same together with trailers and a lens, and that incident to said seizure caused the arrest of all the individual plaintiffs herein and did charge all of the plaintiffs with a violation of Section 235.05 (1)(2) of the Penal Law of the State of New York, being the crime of "Obscenity".

(4) Prior to said seizure and arrests there was no adversary hearing by a court having jurisdiction determining whether or not said print of said film is obscene.

CONCLUSIONS OF LAW

(1) The said seizure of said print of said film, together with trailers and a lens, constituted an illegal seizure being in violation of plaintiffs' rights protected by the 1st, 4th and 14th amendments to the United States Constitution.

(2) Insufficient cause has been established to warrant this Court to enjoin defendants from prosecuting plaintiffs on the above charge of Obscenity.

(3) Insufficient cause has been established to warrant this Court to enjoin defendants from future seizures of other prints of said film "Odd Triangle".

(4) Defendants will suffer no economic injury from the entry of this order so that no bond is required of plaintiffs.

*Appendix B-1*

IT IS, THEREFORE, ORDERED, that defendants or their agents, within 24 hours after service of a certified copy of this order, return to plaintiff, Bethview Amusement Corp., at the office of its authorized agent, David H. Isacson, Esq., 2743 Long Beach Road, Oceanside, New York, the print of the film, "Odd Triangle" together with trailers and a lens, heretofore seized by defendants on May 6, 1969, and

IT IS FURTHER ORDERED, that plaintiff, Bethview Amusement Corp., pursuant to the annexed representation and stipulation of David H. Isacson, shall hold safely said print in its possession; that it shall hold said print in the exact form returned to it subject to call by the defendants upon the trial of plaintiffs in the District Court of Nassau County, without prejudice however, to any rights plaintiffs may have or exercise to object to the production of said print or to move to suppress use of said print at said trial, and

IT IS FURTHER ORDERED, that pending determination of said trial in the District Court of Nassau County, and pursuant to the annexed representation and stipulation of David H. Isacson, plaintiff, Bethview Amusement Corp. shall not exhibit said print of said film to the public, provided the trial is not unreasonably delayed by defendants and reasonableness is to be determined by this Court, and

IT IS FURTHER ORDERED, that defendants' cross-motion to dismiss the complaint is denied.

ANTHONY J. TRAVIA
*Judge, United States District Court*

Dated: U.S. Courthouse
Brooklyn, N. Y.
June 6, 1969

A True Copy
Attest
Dated June 6, 1969
LEWIS ORGEL
*Clerk*
By JAMES R. HORAN
*Deputy Clerk*

*Appendix B-1*

(STIPULATION AND REPRESENTATION)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Civ. Act. No. 69 C 491

—o—

BETHVIEW AMUSEMENT CORP., GEORGE HALL, RUTH BAKEY, CLYDE BRUCE, TOM CUCCAROLE and RICHARD HALBACK,

*Plaintiffs,*

*against*

WILLIAM CAHN, District Attorney for Nassau County, State of New York, RICHARD DELIN, Chief Assistant District Attorney for Nassau County, State of New York, JOHN LANG, Detective Sergeant, Nassau County Police Department,

*Defendants.*

—o—

I, DAVID H. ISACSON, an attorney at law and general counsel and attorney-in-fact for plaintiff, Bethview Amusement Corp., stipulate and represent as follows:

That upon the defendants' compliance with the annexed order of Judge Anthony J. Travia, whereby the defendants are ordered to return to said plaintiff the print of the film "Odd Triangle" together with trailers and a lens heretofore seized by defendants on May 6, 1969 and which is presently held by them,

I will, without waiving any rights that plaintiffs may have to object to the use of said print and trailers at the trial of plaintiffs in the District Court of Nassau County, or any other court, or to move to suppress use of said print or trailers at or prior to said trial, or to seek relief to that effect in any state or federal court, nor to waive plaintiffs'

rights to use said print and trailers subsequent to the disposition of said trial,

1. Hold safely said print and trailers in the possession of plaintiff, Bethview Amusement Corp.,

2. Hold said print and trailers subject to the call of defendants to make said print and trailers available to them at the said trial in District Court of Nassau County, and further subject to any 5th amendment objection thereto or any other constitutional rights which plaintiffs may claim.

3. Until the disposition of said trial of the plaintiffs in the District Court of Nassau County, which shall not be delayed unreasonably by defendants, I will not permit the use by plaintiff, Bethview Amusement Corp., of said print for exhibition to the public.

Dated: New York, N. Y.
June 2, 1969

DAVID H. ISACSON.

## APPENDIX C-1

(SUMMONS)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

BETHVIEW AMUSEMENT CORP., GEORGE HALL, RUTH BAKEY, CLYDE BRUCE, TOM CUCCAROLE and RICHARD HALBACK,

*Plaintiffs,*

*against*

WILLIAM CAHN, District Attorney for Nassau County, State of New York, RICHARD DELIN, Chief Assistant District Attorney for Nassau County, State of New York, JOHN LANG, Detective Sergeant, Nassau County Police Department,

*Defendants.*

You are hereby summoned and required to serve upon ALPERT & ROSENBERG, Esqs., Plaintiffs' attorneys, whose address is: 68 William Street, New York, N.Y. 10005, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Date: May 12, 1969

LEWIS ORGEL
Clerk of the Court
HARRY M. BROOK
Deputy Clerk

*Appendix C-1*

(COMPLAINT).

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

—o—

BETHVIEW AMUSEMENT CORP., GEORGE HALL, RUTH BAKEY, CLYDE BRUCE, TOM CUCCAROLE and RICHARD HALBACK,

*Plaintiffs,*

*against*

WILLIAM CAHN, District Attorney for Nassau County, State of New York, RICHARD DELIN, Chief Assistant District Attorney for Nassau County, State of New York, JOHN LANG, Detective Sergeant, Nassau County Police Department,

*Defendants.*

—o—

Plaintiffs, complaining of the defendants, allege:

1. Plaintiff, Bethview Amusement Corp., is a corporation duly organized and existing pursuant to the laws of the State of New York and maintains its place of business at Roundswamp Road, Old Bethpage, New York.

2. Plaintiff, Bethview Amusement Corp., is the owner and operator of a motion picture theatre known as Bethview Theatre located at Roundswamp Road, Old Bethpage, New York.

3. Plaintiffs, George Hall, Ruth Bakey, Clyde Bruce, Tom Cuccarole and Richard Halback, at all times relevant, were citizens of the State of New York and were employees of plaintiff, Bethview Amusement Corp., at its aforesaid theatre.

4. The defendants are officials of the State of New York as follows:

(a) William Cahn is, and at all times herein relevant was, District Attorney for the County of Nassau, State of New York.

(b) Richard Delin is, and at all times herein relevant was, Chief Assistant District Attorney for the County of Nassau, State of New York.

(c) John Lang is, and at all times herein relevant was, Detective Sergeant, Nassau County Police Department.

5. This Court has jurisdiction of the subject matter of this action under 28 U.S.C. Section 1331, 1332; 28 U.S.C. Section 1343(3); 28 U.S.C. Section 1343(4) and 42 U.S.C. Section 1983, because:

(a) this is an action to redress the deprivation under color of State law, of rights, privileges, or immunities secured to the plaintiffs by the First, Fourth and Fourteenth Amendments to the Constitution of the United States; and

(b) this is an action to secure equitable relief for the protection of the plaintiffs' civil rights, namely the plaintiffs' rights, privileges or immunities under the First, Fourth and Fourteenth Amendments to the Constitution of the United States.

6. At all times relevant hereto, plaintiff, Bethview Amusement Corp., was the licensee of a print of the motion picture film entitled "Odd Triangle" pursuant to contract with the owner thereof, and had been exhibiting said film to the public at its theatre known as Bethview Theatre.

7. Prior to May 6, 1969, said film "Odd Triangle" had been shown in at least three theatres in the New York metropolitan area without incident.

8. On or about May 6, 1969, the defendants, through their duly authorized agents, servants, employees or officers, without a preliminary determination after an adversary hearing by a judicial officer as to the obscenity of said film did unlawfully seize and confiscate the print of said film "Odd Triangle" at the Bethview Theatre and did cause the arrest of plaintiffs, George Hall, Ruth Bakey, Clyde

Bruce, Tom Cuccarole and Richard Halback on the charge of violating Section 235.05 (1) (2) of the Penal Law of the State of New York in committing the crime of Obscenity.

9. The trial of the aforesaid plaintiffs on the aforesaid charge of violating Section 235.05 (1) (2) of the Penal Law of the State of New York has been set down for May 21, 1969 at the District Court of Nassau County, First District Mineola, New York.

10. The aforesaid film "Odd Triangle" was seized without any prior adversary hearing having being held to determine whether or not it was obscene and without any adversary procedure to focus searchingly on the question of its alleged obscenity. To date no adversary hearing of any kind has been held to determine its alleged obscenity.

11. The aforesaid seizure of the film "Odd Triangle" and the aforesaid arrest and prosecution of the plaintiffs by the defendants constitutes harassment and bad faith enforcement of the laws of the State of New York in violation of the First, Fourth and Fourteenth Amendments to the United States Constitution, and Section 1983 of the Civil Rights Act of 1964, 42 U.S.C. Section 1983.

12. On information and belief, the aforesaid seized print of the film "Odd Triangle" is in the possession of the defendants, or their agents, servants or employees, and that defendants have refused to return said print to plaintiffs though demand was duly made.

13. That by reason of the defendants' labeling the film "Odd Triangle" as obscene, and the arrest of plaintiffs, George Hall, Ruth Bakey, Clyde Bruce, Tom Cuccarole and Richard Halback, and the unlawful seizure of the print of the film, plaintiffs have sustained injury to reputation and business, that the individual plaintiffs have suffered humiliation and loss of reputation as a result of their arrests and are in jeopardy of being prosecuted on the basis of unlawfully obtained evidence.

*Appendix C-1*

14. Defendants, and each of them, while acting in their respective official capacities, and while acting in concert and engaged in common design, and while acting intentionally, maliciously and in bad faith, are denying, and will continue to deny and deprive plaintiffs of their rights, privileges and immunities as citizens of the United States and the State of New York, contrary to the provisions of the aforesaid amendments to the Constitution of the United States; that the actions of defendants constitute a prior restraint on communication and renders defendants a pre-censor of films for the County of Nassau, State of New York, in violation of the first and fourteenth amendments to the Constitution of the United States; that the actions of defendants violate the rights of freedom of speech of plaintiffs and constitute a denial of the freedom of expression guaranteed by the First and Fourteenth Amendments to the Constitution of the United States.

WHEREFORE, plaintiffs seek judgment and relief of this Court as follows:

(a) That an order to show cause be issued out of this Court directed to the defendants to appear and show cause why a preliminary injunction pendente lite should not be issued until the hearing of this matter;

(b) That this cause be advanced on the docket of this Court, that this cause be set for a speedy hearing according to law, and upon such preliminary hearing, the District Court issue a temporary injunction to enjoin the defendants, their agents, servants and employees and successors in office, and all persons in active concert and participation with them from seizing any print of the film "Odd Triangle", or otherwise interfering with the exhibition of said film;

(c) Issue its order requiring the defendants, their agents, servants and employees and all persons in active concert and participation with them and all persons acting in their stead in their official capacities, to return to the

plaintiffs, without qualification, the print of the film "Odd Triangle" now in the possession of the defendants;

(d) Issue its order for a preliminary and permanent injunction enjoining the defendants, their agents, servants and employees and all persons in active concert and participation with them from requesting or demanding by judicial mandate that the plaintiffs deliver the film "Odd Triangle" to the defendants, for use in the criminal proceedings or in the preparation of the criminal proceedings involving the plaintiffs now pending in the District Court of the County of Nassau, First District;

(e) Issue its order for a preliminary and permanent injunction enjoining the defendants, their agents, servants and all persons in active concert and participation with them and all persons acting in their stead in their official capacities, from proceeding with any criminal prosecution against the plaintiffs based on the exhibition of the film "Odd Triangle" at the Bethview Theatre on or about May 6, 1969;

(f) That a judgment be entered against defendants, individually and in their official capacities in favor of plaintiffs for special general and punitive damages sustained and costs incurred by plaintiffs, which damages plaintiffs aver will aggregate at least Ten Thousand ($10,000.00) Dollars;

(g) That this Court grant such other and further relief as may appear proper, just and equitable in the premises.

ALPERT & ROSENBERG
Attorneys for Plaintiffs

By: MORTON ALPERT
A member of the Firm
68 William Street,
New York, N.Y.10005

*Appendix C-1*

STATE OF NEW YORK }
COUNTY OF NASSAU } ss.:

DAVID H. ISACSON, being duly sworn, deposes and says that he is General Counsel and attorney in fact for Bethview Amusement Corp., one of the plaintiffs herein; that he has read the above Complaint, that he understands same, and that the statements therein contained are true.

DAVID H. ISACSON

Subscribed and Sworn to before me
this day of May, 1969.

MORTON ALPERT
Notary Public, State of New York
No. 41-0052463
Qualified in Queens County
Commission Expires March 30, 1971

*Appendix C-1*

(Order to Show Cause)

UNITED STATES DISTRICT COURT

Eastern District of New York

Civil Action No.

—o—

Bethview Amusement Corp., George Hall, Ruth Bakey, Clyde Bruce, Tom Cuccarole and Richard Halback,

Plaintiffs,

*against*

William Cahn, District Attorney for Nassau County, State of New York, Richard Delin, Chief Ass't. District Attorney for Nassau County, State of New York, John Lang, Detective Sergeant, Nassau County Police Department,

Defendants.

—o—

Upon reading and filing the annexed affidavit of David Isacson, sworn to May 12, 1969, the motion of Morton Alpert, Esq., attorney for plaintiffs, and the Complaint filed herein, in the office of the Clerk of this Court, all in support of a motion for an order granting a preliminary injunction restraining defendants, and all persons in active concert or participating with them from seizing any prints of the film "Odd Triangle" and directing them to return a print of said film heretofore seized by them and restraining them from proceeding with a criminal prosecution of plaintiffs; and it appearing that plaintiffs are scheduled to stand trial on May 21, 1969, in the District Court of Nassau County, First District, on the charge of obscenity on a criminal complaint filed by defendants, and that the aforesaid seized print may be offered by defendants in evidence against plaintiffs, it is therefore

*Appendix C-1*

ORDERED, that the defendants, William Cahn, District Attorney of Nassau County, State of New York, Richard Delin, Chief Assistant District Attorney of Nassau County, State of New York, John Lang, Detective Sergeant, Nassau County Police Department, and each of them, show cause before this Court on the 16th day of May, 1969, at 10:00 A.M., at the United States Courthouse, 225 Cadman Plaza East, Brooklyn, N. Y., Courtroom No. 9, why a preliminary injunction and thereafter a permanent injunction should not be made and entered in the above-entitled action, directing them to return to plaintiffs the aforementioned seized film, to cease from any further seizures of said film, to desist from prosecuting plaintiffs based on the exhibition of said film, and for such other relief, and it is further

ORDERED, that pending determination of this motion said defendants are stayed from in any manner proceeding with the aforesaid criminal action against plaintiffs in the District Court of Nassau County, First District, and the plaintiffs are stayed from exhibiting said film, and it is further

ORDERED, that service of a copy of this order and the annexed supporting documents on defendants on or before May 14th, 1969, be deemed good and sufficient service.

By The Court

ANTHONY J. TRAVIA
*U.S.D.J.*

Dated: Brooklyn, N. Y.
May 12, 1969
At 5:30 P.M.

A True Copy
Attest
Dated May 13, 1969
LEWIS ORGEL
*Clerk*
By JAMES R. ABRAM
*Deputy Clerk*

*Appendix C-1*

(MOTION FOR PRELIMINARY INJUNCTION AND OTHER RELIEF)

## UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

BETHVIEW AMUSEMENT CORP., GEORGE HALL, RUTH BAKEY, CLYDE BRUCE, TOM CUCCAROLE and RICHARD HALBACK,

*Plaintiffs,*

*against*

WILLIAM CAHN, District Attorney for Nassau County, State of New York, RICHARD DELIN, Chief Assistant District Attorney for Nassau County, State of New York, JOHN LANG, Detective Sergeant, Nassau County Police Department,

*Defendants.*

Plaintiffs Move:

1. The Court for a preliminary injunction enjoining the defendants, William Cahn, Richard Delin, John Lang, their agents, servants and all persons in active concert and participation with them and all persons acting in their stead in their official capacities, pending the final hearing and determination of this action, from seizing any prints of the film "Odd Triangle" or otherwise interfering with the exhibition of said film.

2. That this Court issue an Order requiring the defendants, their agents, servants and all persons in active concert and participation with them and all persons acting in their stead in their official capacities, to return to the plaintiffs, without qualification, the print of the film "Odd Triangle" trailers and a lens in the possession of defendants.

*Appendix C-1*

3. That this Court issue its Order temporarily enjoining the defendants, their agents, servants and all persons in active concert and participation with them and all persons acting in their stead in their official capacities, from proceeding with any criminal prosecution against plaintiffs based on the exhibition of the film "Odd Triangle" at the Bethview Theatre on or about May 6, 1969

on the grounds that

(a) Unless restrained by this Court defendants will perform the acts referred to;

(b) Such action by the defendants will result in irreparable injury, loss and damage to the plaintiffs, as more particularly appears in the Complaint attached hereto;

(c) The plaintiffs are entitled to the print of "Odd Triangle" under the First, Fifth and Fourteenth Amendments to the Constitution of the United States;

(d) The issuance of a preliminary injunction will not cause undue inconvenience or loss to the defendants but will prevent irreparable injury, loss and damage to the plaintiffs.

ALPERT & ROSENBERG
Attorneys for Plaintiffs
By: MORTON ALPERT
A member of the firm
68 William Street
New York, N. Y. 10005

*Appendix C-1*

(AFFIDAVIT OF DAVID ISACSON)

## UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

———o———

BETHVIEW AMUSEMENT CORP., GEORGE HALL, RUTH BAKEY, CLYDE BRUCE, TOM CUCCAROLE and RICHARD HALBACK,

Plaintiffs,

*against*

WILLIAM CAHN, District Attorney for Nassau County, State of New York, RICHARD DELIN, Chief Ass't District Attorney for Nassau County, State of New York, JOHN LANG, Detective Sergeant, Nassau County Police Department,

Defendants.

———o———

STATE OF NEW YORK }
COUNTY OF NASSAU } ss.:

DAVID ISACSON, being duly sworn deposes and says:

1. I am general counsel and attorney-in-fact for plaintiff Bethview Amusement Corp., and I have personal knowledge of the facts and circumstances of this action and application.

2. I make this affidavit in support of this motion for a preliminary injunction to (a) restrain defendants from further seizure of prints of the motion picture film entitled "Odd Triangle" (b) to direct return by the defendants to the plaintiffs of a print of said film, trailers and a lens previously seized by them on May 6, 1969 at the Bethview Theatre and (c) to restrain defendants from proceeding with the criminal prosecution of plaintiffs as a result of the exhibition of said film to the public on May 6, 1969.

*Appendix C-1*

3. Plaintiff, Bethview Amusement Corp., is the owner of the Bethview Theatre, located at Roundswamp Road, Old Bethpage, New York. For the period April 29 through May 6, 1969, it had been exhibiting to the public a motion picture film entitled "Odd Triangle" under a license agreement with the distributor, A. L. Shackleton Films, 1721 Broadway, New York City.

4. On May 6, 1969, at about 9:00 P.M. the print of said film, trailers and a lens were seized and confiscated by the Nassau County Police Department under the direction of defendants, and the employees of the theatre, to wit, George Hall, manager, Ruth Bakey, cashier, Clyde Bruce, usher, Tom Cuccarole, projectionist and Richard Halback, usher, were arrested pursuant to a warrant of arrest signed by Judge Charles P. Marchese of the District Court of Nassau County, First District. After arraignment and fixation of bail, the trial of plaintiffs has been set for May 21, 1969, at said Court on the charge of Obscenity.

5. A copy of the Information and affidavit of the complaining officer is hereto annexed.

6. Deponent wishes to stress that at no time was a prior adversary hearing held to determine whether or not there was cause for the seizure on a charge of obscenity, nor was a search warrant ever revealed.

7. As is indicated in the accompanying brief submitted herewith the overwhelming weight of the law is that such a seizure and arrests as was performed in this instance are a clear violation of the constitutional rights of plaintiffs. The crux of the matter is that no prior adversary hearing was held incident to the seizure and arrests.

8. No hardship will ensue to the defendants as a result of a preliminary injunction, but unless plaintiffs have the

benefit of such an injunction they stand the immediate danger of being unlawfully prosecuted incident to an unlawful arrest. In addition, the business of the Bethview Theatre has been unlawfully disrupted.

9. Although Bethview Amusement Corp. is not the owner of the seized film it is responsible for the care of said film under its leasing agreements. Defendants harassment of plaintiffs has unlawfully curtailed the business of the Bethview Theatre.

10. No prior application for the relief sought herein has been made to any Court or Judge.

WHEREFORE, deponent prays for a preliminary injunction as dscribed in paragraph 2 herein, and for such other and further relief as may be proper.

DAVID ISACSON

Sworn to before me this
12 day of May, 1969.

MORTON ALPERT
Notary Public, State of New York
No. 41-0052468
Qualified in Queens County
Commission Expires March 30, 1971

*Appendix C-1*

(Information and Complaint)

DISTRICT COURT OF NASSAU COUNTY

First District—Court of Special Sessions

———o———

The People of the State of New York,

*against*

John Doe, the said name John Doe being fictitious, the person intended being the Manager of The Bethview Theatre, Old Bethpage Road, Old Bethpage, New York, Richard Roe, the said name Richard Roe being fictitious, the person intended being the Ticket Seller of The Bethview Theatre, Robert Roe, the said name Robert Roe being fictitious, the person intended being the Projectionist of The Bethview Theatre, Ronald Roe, the said name Ronald Roe being fictitious, the person intended being the Ticket Taker of The Bethview Theatre, Ralph Roe, the said name Ralph Roe being fictitious, the person intended being the Usher of The Bethview Theatre, Molly Moe, the said name Molly Moe being fictitious, the person intended being an Employee of The Bethview Theatre, Harry Hoe, the said name Harry Hoe being fictitious, the person intended being an Employee of The Bethview Theatre, The Bethview Amusement Corporation and The David Doe Corporation, the said designation David Doe being fictitious, the Corporation intended being the corporation owning and operating The Bethview Theatre on Old Bethpage Road, Old Bethpage, Nassau County, New York.

———o———

Before:

Hon. Charles P. Marchese, *Judge, District Court*

Before me, Hon. Charles P. Marchese, Judge, District Court of Nassau County, New York, came the 6th day of May, 1969, Detective Sergeant John Lang, Shield No. 222, and gave information and complaint as follows, to wit:

*Appendix C-1*

STATE OF NEW YORK }
COUNTY OF NASSAU } ss.:

JOHN LANG, being duly sworn, deposes and says that he is a member of the Nassau County Police Department, attached to the office of the District Attorney of Nassau County, and that on the 6th day of May, 1969, at about and between 7:25 P.M. and 8:40 P.M., at the premises known as The Bethview Theatre, Old Bethpage Road, Old Bethpage, New York, in the County of Nassau, the defendant did wilfully, wrongfully and unlawfully violate the provisions of Subdivisions (1) and (2) of Section 235.05 of the Penal Law of the State of New York and did commit the crime of Obscenity.

COUNT I.

in that at and between the times and at the place aforementioned, the defendant, knowing the contents and character of a certain motion picture entitled "Odd Triangle" did, with intent to promote the same, knowingly possess said motion picture and promote the same before an audience of the public, which motion picture and promotion thereof was obscene in that it showed acts depicting nudity and sex, which motion picture and nudity and sex when, considered as a whole, predominantly appealed to prurient, shameful and morbid interest in nudity and sex, and went substantially beyond customary limits of candor in describing and representing such matters and was and is utterly without redeeming social value; the said motion picture depicted the following scenes: Scenes showing acts of sexual intercourse between nude male and nude female, the acts depicted involving various males and females, some of them married persons committing adultery, and being performed, in some instances, to the accompaniment of ecstatic noises and moaning emitted by the female; scenes showing sexual

contact between male and female showing the male face and head between the nude female's raised and spread legs and positioned in proximity to her pelvic region depicting the male engaging in cunnilinguis while, at the same time, another female manipulates and fondles the nude breasts of the female being subjected to cunnilinguis while the female being subjected to cunnilinguis emits moans and ecstatic vocal sounds and contorts her body in writhing motions while her face exhibits expressions of ecstatic emotion; scenes depicting acts of lesbian sexual activity between two nude females and three nude females in which the females fondle and caress each other's breasts with hands and mouth and in which one female stimulates the body of another by massaging her breasts and the rest of her body with a vibrator while a third female fondles and caresses the breasts of the female being massaged by the vibrator; in some of these scenes involving three females, the positioning of the bodies and the actions of the female operating the vibrator are such as to suggest that she is applying the vibrator to the vaginal region of the female being massaged and this activity is accompanied by the ecstatic moaning and excited vocal noises of the female being massaged; a scene showing two nude females on a bed kissing and caressing and indulging in lesbian sexual lovemaking.

The entire film consists of a succession of nude sexual acts of sexual intercourse, cunnilinguis and lesbian sexual contact and lovemaking of the aforesaid type.

COUNT II

in that at and between the times and at the place aforementioned, the defendant, knowing the contents and character of a certain motion picture entitled "ODD TRIANGLE", did knowingly exhibit, present and otherwise promote said motion picture before an audience of the public, which

motion picture and promotion thereof was obscene in that it showed acts depicting nudity and sex, which motion picture and nudity and sex when, considered as a whole, predominantly appealed to prurient, shameful and morbid interest in nudity and sex, and went substantially beyond customary limits of candor in describing and representing such matters and was and is utterly without redeeming social value; the said motion picture depicted scenes showing acts of sexual intercourse between nude male and nude female, the acts depicted involving various males and females, some of them married persons committing adultery, and being performed, in some instances, to the accompaniment of ecstatic noises and moaning emitted by the female; scenes showing sexual contact between male and female showing the male face and head between the nude female's raised and spread legs and positioned in proximity to her pelvic region depicting the male engaging in cunnilinguis while, at the same time, another female manipulates and fondles the nude breasts of the female being subjected to cunnilinguis while the female being subjected to cunnilinguis emits moans and ecstatic vocal sounds and contorts her body in writhing motions while her face exhibits expressions of ecstatic emotion; scenes depicting acts of lesbian sexual activity between two nude females and three nude females in which the females fondle and caress each other's breasts with hands and mouth and in which one female stimulates the body of another by massaging her breasts and the rest of her body with a vibrator while a third female fondles and caresses the breasts of the female being massaged by the vibrator; in some of these scenes involving three females, the positioning of the bodies and the actions of the female operating the vibrator are such as to suggest that she is applying the vibrator to the vaginal region of the female being massaged and this activity is accompanied by the ecstatic moaning and excited vocal noises of the female being massaged; a scene show-

ing two nude females on a bed kissing and caressing and indulging in lesbian sexual lovemaking.

Your deponent, as a member of the Nassau County Police Department, paid an admission price to an employee of said theatre at said times and place, and thereafter personally viewed said motion picture in said theatre between the times mentioned, at which times he was in the presence of other members of the public comprising the audience therein.

All of the above acts chargeable to said defendant are connected together and are part of a common scheme and plan to violate Subdivisions (1) and (2) of said Section 235.05.

Wherever the word "defendant" is used in this Information it is meant to refer to each and every defendant named in the title of this Information.

WHEREFORE, he prays that the said defendants may be arrested and dealt with in the premises according to law.

JOHN LANG

SUBSCRIBED AND SWORN TO BEFORE ME
this 6th day of May, 1969

CHARLES P. MARCHESE
*Judge, District Court of Nassau County*

## APPENDIX D-1

(NOTICE OF CROSS-MOTION)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Civil Action No. 69C 491

———o———

BETHVIEW AMUSEMENT CORP., GEORGE HALL, RUTH BAKEY, CLYDE BRUCE, TOM CUCCAROLE and RICHARD HALBACK,

Plaintiffs,

*against*

WILLIAM CAHN, District Attorney for Nassau County, State of New York, RICHARD DELIN, Chief Ass't District Attorney for Nassau County, State of New York, JOHN LANG, Detective Sergeant, Nassau County Police Department,

Defendants.

———o———

*Sir*:

PLEASE TAKE NOTICE that upon the complaint herein, defendants will make a cross-motion to plaintiff's motion for a temporary injunction before the United States District Court for the Eastern District of New York, on the 20th day of May, 1969, at 2 P.M., at the United States Courthouse, 225 Cadman Place, East, Brooklyn, New York, Court Room #9, for an Order dismissing the complaint herein for the following reasons:

1. The complaint fails to state a claim upon which relief can be granted;

2. This Court lacks jurisdiction over the subject matter;

3. This Court should abstain from rendering a decision on the merits respecting the matters alleged in the complaint;

*Appendix D-1*

and also for an Order vacating the Order staying the defendants from prosecuting a certain criminal action against plaintiffs based upon the public exhibition on May 6, 1969 of the motion picture film entitled "ODD TRIANGLE", which stay is contained in the Order to Show Cause issued on May 12, 1969 by Judge Anthony Travia of this Court.

Dated: Mineola, New York
May 20, 1969

Yours, etc.,

WILLIAM CAHN,
District Attorney of Nassau County
Attorneys for Defendants
Office & P.O. Address
Nassau County Court House
262 Old Country Road
Mineola, New York 11501

By Richard Delin
Chief Assistant District Attorney

To:
ALPERT & ROSENBERG, Esqs.
Attorneys for Plaintiffs
68 William Street
New York, N. Y. 10005

*Appendix D-1*

(AFFIDAVIT OF RICHARD DELIN)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

---

BETHVIEW AMUSEMENT CORP., GEORGE HALL, RUTH BAKEY, CLYDE BRUCE, TOM CUCCAROLE and RICHARD HALBACK,

Plaintiffs,

*against*

WILLIAM CAHN, District Attorney for Nassau County, State of New York, RICHARD DELIN, Chief Ass't. District Attorney for Nassau County, State of New York, JOHN LANG, Detective Sergeant, Nassau County Police Department,

Defendants.

---

STATE OF NEW YORK }
COUNTY OF NASSAU } ss.:

RICHARD DELIN, being duly sworn, deposes and says:

That I am Chief Assistant District Attorney of Nassau County, State of New York, and a defendant in this action. I make this affidavit in behalf of the defendants herein in opposition to plaintiffs' motion for a temporary injunction restraining the pending prosecution of plaintiffs for obscenity arising out of public exhibition on May 6, 1969 of a certain motion picture entitled "ODD TRIANGLE" and for the return of the print of the said motion picture film seized on May 6, 1969, and further restraining defendants from prosecuting the plaintiffs for future exhibitions of the said film.

*Appendix D-1*

The plaintiffs' complaint and the affidavit of David Isacson in support of its motion for the above relief makes conclusory allegations to the effect that, in connection with the said pending prosecution, defendants have harassed the plaintiffs and the complaint pleads in conclusory terms that the said prosecution and seizure of the said film constituted "bad faith enforcement of the laws of the State of New York."

Deponent has personal knowledge of this case and states emphatically that the prosecution and the seizure referred to above were not undertaken by the defendants herein in bad faith or with the purpose of harassing any of the plaintiffs or suppressing their constitutional rights. The sole purpose of the defendants was the performance of their official duties to enforce the laws of the State of New York.

The Information of Detective Sergeant John Lang was taken and the search warrant and the arrest warrants were granted by Nassau County District Judge Charles P. Marchese after he viewed a public exhibition of the said motion film entitled "ODD TRIANGLE".

The film was seized pursuant to the authorization of the search warrant granted by Judge Marchese immediately after the next to the last performance of the said film on May 6, 1969, the last night of its scheduled run at the Bethview Theatre.

The said prosecution was scheduled to be tried on May 21, 1969, and The People had planned to proceed to trial on that date, until they were served with this Court's Order to Show Cause staying the prosecution in question.

Neither plaintiffs' complaint, nor the motion papers, discharge their burden of demonstrating that plaintiffs, or any of them, are in danger of suffering irreparable injury or that they lack an adequate remedy at law and in the State Courts.

The plaintiffs' application for relief herein is totally lacking in merit for the reasons set forth in the Memoran-

dum of Law submitted by defendants in opposition to plaintiffs' motion herein. Defendants are moving this Court to dismiss the complaint herein in cross motion to plaintiffs' motion for the relief described above.

WHEREFORE, defendants respectfully pray that plaintiffs' motion be denied in all respects.

RICHARD DELIN

(Sworn to May 20th, 1969.)

CATHERINE SCORDETO
Notary Public, State of New York
No. 30-3566300
Qualified in Nassau County
Commission Expires March 30, 1971

*Appendix D-1*

(PROPOSED ANSWER)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

BETHVIEW AMUSEMENT CORP., GEORGE HALL, RUTH BAKEY, CLYDE BRUCE, TOM CUCCAROLE and RICHARD HALBACK,

Plaintiffs,

*against*

WILLIAM CAHN, District Attorney for Nassau County, State of New York, RICHARD DELIN, Chief Ass't. District Attorney for Nassau County, State of New York, JOHN LANG, Detective Sergeant, Nassau County Police Department,

Defendants.

Defendants, by their attorney, William Cahn, District Attorney of Nassau County, answering the Complaint of the plaintiffs herein respectfully allege as follows:

First: Deny the allegations of plaintiffs' complaint numbered "5", "5(a)", "5(b)", "11", "13" and "14".

Second: Admit the allegations of plaintiffs' complaint numbered "1", except deny knowledge or information sufficient to form a belief as to whether the Bethview Amusement Corp. is duly organized.

Third: Admit the allegations of plaintiffs' complaint numbered "3", except deny knowledge or information sufficient to form a belief as to whether the plaintiffs named in the said allegation numbered "3" are citizens of the State of New York.

*Appendix D-1*

Fourth: Admit the allegations of plaintiffs' complaint numbered "6", except deny knowledge or information sufficient to form a belief as to whether the Bethview Amusement Corp. was the licensee of the motion picture film entitled "ODD TRIANGLE" pursuant to a contract with the owner thereof.

Fifth: Deny knowledge or information sufficient to form a belief as to the truth of the allegations of plaintiffs' complaint numbered "7".

Sixth: Deny the allegations of plaintiffs' complaint numbered "8", except admit that a print of the film "ODD TRIANGLE" was seized at the Bethview Theatre under the authority of a search warrant granted by Nassau County District Court Judge Charles P. Marchese after Judge Marchese had viewed a public performance of the said film "ODD TRIANGLE" and that the plaintiffs Hall, Baker, Bruce, Cuccarole and Halback were arrested pursuant to arrest warrants granted by Judge Marchese after he had viewed the said film as aforesaid and had then taken the sworn information of Detective Lang concerning said film performance.

Seventh: Deny the allegations of plaintiffs' complaint numbered "10", except admit that the procedure for obtaining the search warrant and the arrest warrants herein was ex parte.

Eighth: Admit the allegations of plaintiffs' complaint numbered "12", except deny that demand was duly made for return of the print of the film "ODD TRIANGLE".

First Defense: The plaintiffs have adequate remedies in the State Courts by which they may assert the contentions sought to be raised in the complaint herein.

*Appendix D-1*

Second Defense: This Court should abstain from deciding this case on the merits because the complaint herein does not plead the ultimate facts which would properly invoke this Court's power of decision.

Third Defense: The seizure of the print of the motion picture film entitled "Odd Triangle" and the arrest of the plaintiffs was effected pursuant to the authorization of warrants and the seizure, arrests and prosecution of plaintiffs was duly authorized by law.

Fourth Defense: The defendants are immune from liability for their official acts in connection with the aforesaid arrests and seizure and the prosecution of plaintiffs.

Fifth Defense: The plaintiffs George Hall, Ruth Bakey, Clyde Bruce, Tom Cuccarole and Richard Halback are not real parties in interest since they have no interest in the film seized and they have no First Amendment rights to vindicate with respect to the exhibition of films at the Bethview Theatre.

WHEREFORE, the defendants demand judgment dismissing the complaint herein.

WILLIAM CAHN
District Attorney of Nassau County
Attorney for Defendants
262 Old Country Road
Mineola, New York 11501

To:
ALPERT & ROSENBERG, ESQS.
Attorneys for Plaintiffs
68 William Street
New York, New York 10005

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IN THE

# Supreme Court of the United States

October Term, 1969

**No. 1034**

WILLIAM CAHN, District Attorney for Nassau County, State of New York, RICHARD DELIN, Chief Ass't District Attorney for Nassau County, State of New York, JOHN LANG, Detective Sergeant, Nassau County Police Department,
*Petitioners,*

*v.*

BETHVIEW AMUSEMENT CORP., GEORGE HALL, RUTH BAKEY, CLYDE BRUCE, TOM CUCCAROLE and RICHARD HALBACK,
*Respondents.*

## RESPONDENTS' BRIEF IN OPPOSITION TO THE APPLICATION FOR A WRIT OF CERTIORARI

MORTON ALPERT
*Attorney for Respondents*
68 William Street
New York, New York 10005

ALPERT & ROSENBERG
DAVID H. ISACSON
*Of Counsel*

# TABLE OF CONTENTS


| | PAGE |
|---|---|
| OPINIONS BELOW | 1 |
| JURISDICTION | 2 |
| QUESTION PRESENTED | 2 |
| STATEMENT | 2 |
| REASONS FOR DENYING THE WRIT | 3 |
| CONCLUSION | 6 |

IN THE

# Supreme Court of the United States

**October Term, 1969**

**No. 1034**

WILLIAM CAHN, District Attorney for Nassau County, State of New York, RICHARD DELIN, Chief Ass't District Attorney for Nassau County, State of New York, JOHN LANG, Detective Sergeant, Nassau County Police Department,
*Petitioners,*

*v.*

BETHVIEW AMUSEMENT CORP., GEORGE HALL, RUTH BAKEY, CLYDE BRUCE, TOM CUCCAROLE and RICHARD HALBACK,
*Respondents.*

## RESPONDENTS' BRIEF IN OPPOSITION TO THE APPLICATION FOR A WRIT OF CERTIORARI

### Opinions Below

In addition to the printed opinions below described in the Petition, on November 21, 1969 Judge Anthony J. Travia of the U. S. District Court for the Eastern District of New York granted respondents' motion for summary judgment enlarging his preliminary injunction order (which

is the subject of this appeal) into a permanent injunction directing the return of the seized film, and granted petitioners' cross-motion to dismiss the remaining causes of action in the complaint. This has not yet been reduced to written judgment form.

## Jurisdiction

Jurisdiction is as stated in the Petition.

## Question Presented

Whether the protection provided by the first amendment requires that a motion picture theatre owner be given an opportunity to be heard on the issue of obscenity before a film could be seized by the police?

## Statement

In addition to the facts stated in the Petition the following facts are pertinent:

The seized print of the film "Odd Triangle" was the only print to have ever been exhibited in Nassau County, New York, which has a population of over a million people. A second print of "Odd Triangle" was seized in adjoining Queens County on May 7, 1969, one day after the instant seizure in Nassau County. This print was the only one ever to have been exhibited in Queens which also has a population of over a million people. The film was not being exhibited anywhere else in the entire New York City

metropolitan area. The end result of the two successive seizures was that the film was forceably withdrawn from the entire New York audience potential so that anyone disposed to see the film in New York or Nassau could not.

This was accomplished on an ex parte application by the public prosecutor to a single criminal court judge who without benefit of hearing opposing argument or proof yielded to his personal and idiosyncratic notions of propriety.

The propensities of the District Court of Nassau County became apparent when in the face of Judge Travia's ruling that the film was unconstitutionally seized, it nevertheless denied respondents' motion to suppress its use at the state obscenity trial, and then knowing full well that Judge Travia's decision was sub judice in the Second Circuit Court of Appeals it forced respondents to trial before a decision could be handed down from the Second Circuit. Of course, it brushed aside all objections to the film coming into evidence. The result is that respondent corporation stands convicted in state court solely on the basis of evidence which the U. S. District Court and the U. S. Court of Appeals have ruled illegally obtained in violation of first amendment rights.

## Reasons for Denying the Writ

1. This Court has very recently denied certiorari in *Wilkinson* v. *Tyrone, Inc.*, 6 Cr. L. 4093, which involved precisely the same issue and factual background as the case at bar. There too, without benefit of a prior adversary hearing, a single film print was seized by police after

a judge who had viewed the film at the theatre issued search and arrest warrants. Surprisingly, petitioner argues that a distinguishing factor in the case at bar is that the film was ultimately proven obscene because of the state court conviction. This appears to be boot-strap reasoning because an eventual conviction based on illegally seized evidence does not retroactively cure an originally illegal procedure.

2. The various circuit courts of appeal that have passed on this issue are unanimous in their conclusion that a prior adversary hearing is a prerequisite to any seizure of a motion picture film.

> *Metzger* v. *Pearcy*, 393 F. 2d 202 (7th Cir. 1968);
> *Tyrone, Inc.* v. *Wilkinson* (4th Cir. May 6, 1969, —— F.2d ——);
> *Cambist Films, Inc.* v. *Duggan* (3rd Cir. Dec. 30, 1969, —— F. 2d ——);
> *Bethview Amusement Corp.* v. *Cahn*, 416 F.2d 410 (2nd Cir., 1969).

3. There is no conflict within the Second Circuit Court of Appeals concerning the issue at hand. Petitioner argues that *U. S.* v. *Wild and Corrado*, —— F.2d —— (2nd Cir. 1969) upholds its contention that no prior adversary hearing is required where the products of the search are deemed to be instrumentalities and evidence of crimes. But that case concerned slides or still photographs intended to be sent through the mails and which were seized in a private residence. This is readily distinguishable from a motion picture film exhibited at a public theatre. "* * * films differ from other forms of expression." *Freedman* v. *Maryland*, 380 U. S. 51, 61.

"Particularly in the case of motion pictures, it may take very little to deter exhibition in a given locality. The exhibitor's stake in any one picture may be insufficient to warrant a protracted and onerous course of litigation." *Freedman* v. *Maryland,* 380 U. S. 51, 59.

4. Enforcement of state obscenity laws is not seriously impeded by the requirement of a prior adversary hearing. Other than sudden seizure without notice, the state has the following courses of action:

(a) It can commence a civil proceeding for an injunction pendente lite against the showing of an allegedly obscene form of expression, as provided in Section 22-a of the New York Code of Criminal Procedure, and which was sanctioned by this Court in *Kingsley Books* v. *Brown,* 345 U. S. 436.

(b) It can obtain an order to show cause why a film should not be seized as obscene.

(c) It may resort to its subpoena power.

(d) It may obtain an ex parte restraining order.

5. The impact on First Amendment rights of the seizure of a single film playing to a mass audience is the same as the seizure of a massive quantity of books.

In *Quantity of Copies of Books* v. *State of Kansas,* 378 U. S. 205, 84 S.Ct. 1723, this Court struck down a state statute authorizing the seizure of allegedly obscene books before an adversary determination of their obscenity. At page 11 of its petition, petitioner concedes that mass seizure under the authority of the search warrant issued ex

parte does present certain grave factual issues concerning freedom of expression. But a single film may be viewed by a thousand people the same way as a thousand books may be read by a thousand people. In either case an ex parte seizure does not adequately safeguard against the suppression of non-obscene expression.

## CONCLUSION

**For all of the foregoing reasons, the petition for a writ of certiorari should be denied.**

Respectfully submitted,

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January 29, 1970